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LEVEL 1 - 52 OF 96 ITEMS

Journal of Law & Education

July, 1997

26 J.L. & Educ. 113

LENGTH: 4672 words

LAW REVIEW DIGESTS

[NO NAME IN ORIGINAL]

SUMMARY:
... To achieve home rule would require a constitutional amendment modifying or abolishing a state's board of education as well as an enabling statute passed by the legislature. ... Full achievement of the holistic education offered at VMI and the Citadel is possible only in a single-gender institution and the state's right to offer single-gender education should be upheld. State sponsored single-gender educational programs cannot operate in a manner that violates the Constitution. ... Because drug use by an athlete participating in school sports poses a serious threat of harm both to the athlete and others participating, an athlete using drugs creates potential harm to the people a school district is charged with protecting, schoolchildren. ... Moreover, the legislature has enacted specific regulations dealing with learning disabled education mandating it for handicapped children and providing discretionary options for special education of gifted children. ... Broadley does not preclude a child in the future from showing infringement on his or her fundamental right to education by a school's refusal to provide special education, thus effectively denying the fundamental right to education. ...

TEXT:

[*113] Home rule for school districts is desirable because it provides a more efficient legal framework for governing schools. Supporters of home rule for school districts want powers granted to school boards similar to those currently held by cities and counties. To achieve home rule would require a constitutional amendment modifying or abolishing a state's board of education as well as an enabling statute passed by the legislature. Without home rule legislation, local governments possess only three powers, those granted by express words, those fairly implied to powers expressly granted, and those essential to achievement of the declared objectives. Conversely, with home rule there is a grant of power to the locality as well as a limitation on state legislative power over the local unit. Home rule is desirable because such power would enable local school boards to act in the best interest of the community without the burden on the school board to seek legislative approval for routine administrative tasks. Home rule would provide school districts with a more certain framework regarding legality of its decisions. Charles Benjamin, Should There Be Home Rule for Kansas School Districts?, 5 KAN. J.L. & PUB. POL'Y 175 (1996).

Discussion addressing whether to adopt a system of rewards and sanctions of school district performance based on the level of state control. The state legislature passed a new system of accreditation for school districts, the

Quality Performance Accreditation (QPA). The purpose of the QPA is to ensure the academic standards of the state meet or exceed the standards of the rest of the world. The author examines whether sanctioning poor school district performance with increased state control or rewarding good performance with decreased control is effective as well as if it is permissible under the state constitution. Possible state constitutional difficulties should be addressed by allowing for input from local school boards. Additionally, the legislature should consider whether increasing state control is the best option in light of a lack of empirical data showing its effectiveness. Denise Howard, Rewarding and Sanctioning School District Performance By Decreasing or Increasing the Level of State Control, 5 KAN. J.L. & PUB. POL'Y 187 (1996).

[*114] Full achievement of the holistic education offered at VMI and the Citadel is possible only in a single-gender institution and the state's right to offer single-gender education should be upheld. State sponsored single-gender educational programs cannot operate in a manner that violates the Constitution. Equal opportunity access to the unique educational programs offered by VMI and the Citadel must be given to both genders. However, real differences between the genders call for differing educational approaches in single-gender military education. The Equal Protection Clause should not require more if parallel single-gender military education programs are designed to reach the same end result for the genders, and the differences in the programs relate to real differences between the genders. Single-gender education should be permitted to continue at VMI and the Citadel. Jeremy N. Jungreis, Comment, Holding the Line at VMI and the Citadel: The Preservation of a State's Right to Offer a Single-Gender Military Education, 23 FLA. ST. U.L. REV. 795 (1996).

School district policy on testing student athletes for drugs was correctly upheld by the Supreme Court as nonviolative of the student athlete's Fourth Amendment Rights prohibiting unreasonable search and seizure. The Fourth Amendment protection against unreasonable search and seizure depends on the reasonableness of a particular privacy interest under the circumstances posed by a given situation. The Veronia School District 47J faced a seemingly uncontainable drug problem with the student athletes posing a prominent part of the problem. Because drug use by an athlete participating in school sports poses a serious threat of harm both to the athlete and others participating, an athlete using drugs creates potential harm to the people a school district is charged with protecting, schoolchildren. Thus, targeting student athletes for drug use testing was an appropriate action undertaken by the school district. The Court determined a diminished expectation of privacy existed, the nature and immediacy of the concern was high, and the means chosen were efficient. All three factors played an indispensable role in upholding the action of the school district as constitutional. Michael D. Mosser, Note & Comment, Random Drug-Testing High School Student Athletes in Veronia School District 47J v. Acton: Is the War on Drugs a Losing Battle for the Fourth Amendment, 17 WHITTIER L. REV. 527 (1996).

Tradition of parental educational authority should be respected and enlarged. Political theory has treated parental educational interests as secondary to the state's interest in preparing children for citizenship through schooling. As long as parental choices are reasonable, parents should be permitted to instill their values in their children and reject state efforts to pass contrary values through mandatory schooling. The First Amendment guarantee of free speech and expression, when interpreted correctly, protects parental educative speech [*115] against content-based state regulation. Accordingly, parental

educative speech should be understood to include both direct and indirect parental communication in the schools parents choose. Stephen G. Gilles, On Educating Children: A Parentalist Manifesto, 63 U. CHI. L. REV. 937 (1996).

Student-sponsored prayer at graduation is permissible because the government cannot permissibly place religious speech on a level unequal to nonreligious speech. In Jones v. Clear Creek Independent School District, the court came to the correct conclusion that student-sponsored graduation prayers were constitutionally permissible; however, the court reached the right result by using the wrong reasoning. Although the court reached its conclusion based on the noninvolvement of the government, the correct analysis to the proper result is because the government must allow religious speech to occur on an equal basis with nonreligious speech. Since an all-or-nothing approach does not work, and given the perceived benefits of public forum speech, a limited public forum approach to graduation invocations would be best. Rick A. Swanson, Time for a Change: Analyzing Graduation Invocations and Benedictions Under Religiously Neutral Principles of the Public Forum, 26 U. MEM. L. REV. 1405 (1996).

Several compelling reasons exist for rejecting race exclusive scholarships. Race based scholarships violate both the equal protection clause and the anti-discriminatory provisions of Title VI. Race-exclusive affirmative action policies are as objectionable as race discrimination. Affirmative action as a public policy has received very little critical evaluation because of the pernicious nature of affirmative action as an ichnographic social policy. Thus, the policy perpetuates itself by hiding behind what it claims to represent, because no one can be against what it purports to represent. A better alternative to race-exclusive scholarships is class conscious affirmative action because in the real world race is a factor, but money matters. Darnell Weeden, Just Say No to Race Exclusive College Scholarships: From an Afrocentric Perspective, 20 T. MARSHALL L. REV. 205 (1995).

Holding in case denying gifted children right to special education was more narrow than to preclude a child from asserting a similar claim of a right to special education. In Broadley v. Board of Education, the Connecticut Supreme Court deferred to the legislature in denying gifted children the right to a special education program. A fundamental right to free public education exists in Connecticut. Moreover, the legislature has enacted specific regulations dealing with learning disabled education mandating it for handicapped children and providing discretionary options for special education of gifted children. In Broadley, the child sought judgment only on his right to receive special education. [*116] Broadley does not preclude a child in the future from showing infringement on his or her fundamental right to education by a school's refusal to provide special education, thus effectively denying the fundamental right to education. Specifically, by providing evidence of inability to achieve a minimal education, a gifted child could state a viable claim of denial of the fundamental right to education. Gwen E. Murray, Special Education for Gifted Children: Answering the "Right" Question, 15 Q.L.R. 103 (1995).

In states where the highest courts hold that their state constitution's education clauses give individuals an enforceable right to education, the government must provide an alternative education to suspended and expelled students. While not all states declare that the right to education is fundamental, those that do must recognize that suspended and expelled students still possess the right to education. This is so even though a student's due process rights may not have been violated through suspension and expulsion

hearings. The strict scrutiny equal protection analysis which courts must apply when fundamental rights are at stake is not narrowly tailored to fit the state's interest in maintaining peace in schools when the individual is expelled or suspended without an offer for alternative education. Roni R. Reed, Education and the State Constitutions: Alternatives for Suspended and Expelled Students, 81 CORNELL L. REV. 582 (1996).

A white middle-class writer who attended a Petersburg, Virginia, public elementary school when the Supreme Court struck down the Separate-But-Equal Doctrine in Brown v. Board of Education, 347 U.S. 483 (1954) recounts how state and local powers preserved segregated public schools successfully for another ten years. The essay explores how Virginia kicked in its heels to avoid segregation while neighboring, less vocal states like North Carolina appeared to comply with Brown, but in fact were just as segregated as vocal states ten years later. Carl Tobias, Essay, Public School Desegregation in Virginia During the Post-Brown Decade, 37 WM. & MARY L. REV. 1261 (1996).

Expert witness opinions show that no educators approve of the adversative methodology of the all-male Virginia Military Institute (VMI). Over the years, the so-called unique educational experience at VMI is one that has been created by the cadets themselves, not policies instituted by the state. To accept VMI's thesis that women would destroy the unique, adversative educational opportunity would legitimize the cadets' authority over state educational policy. Thus, the idiosyncracies of cadet culture would be placed above the constitutional and equal protection demands. Dianne Avery, Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in [*117] the Virginia Military Institute Case, 5 S. CAL. REV. L. & WOMEN'S STUD. 189 (1996).

In Lakewood, California, high school boys joined together as the "Spur Posse" to rape and molest girls as young as ten years old to earn points and win in a sexual conquest "game." When one girl reported a rape to school administration, the school did nothing. This article proposes that Title IX, 20 U.S.C. Section 1681 (1988), should be amended to prohibit explicitly sexual harassment and deny federal funding to any school that did not implement a sexual harassment policy. Without such provisions, it appears victims of peer sexual harassment are without a remedy. Alexandra A. Bodnar, Arming Students for Battle: Amending Title IX to Combat the Harassment of Students by Students in Primary and Secondary School, 5 S. CAL. REV. L. & WOMEN'S STUD. 549 (1996).

Although Section 504 of the Rehabilitation Act of 1973 proclaims that discrimination against individuals with disabilities is illegal in any federally funded activity, the Department of Education's Office of Civil Rights (OCR) opposes judicial interpretation of the statute's applicability. While judges have ruled Section 504 means primary and secondary public schools must make "reasonable" accommodations but not "substantial" modifications, the OCR supports a pure needs-based standard: Provide students with disabilities services without any cost limitations. This article proposes three possible solutions to the legal and financial dilemma created by the two viewpoints. Kristine L. Lingren, Comment, The Demise of Reasonable Accommodation Under Section 504: Special Education, the Public Schools, and an Unfunded Mandate, 1996 WIS. L. REV. 633 (1996).

The Supreme Court's ruling that random suspicionless drug testing of public high school athletes is constitutional chips away at the Fourth Amendment's prohibition of unreasonable searches and seizures. Vernonia School District

47J v. Acton, 115 S. Ct. 2386 (1995). The Scope of Vernonia's holding is very broad. The decision will provide schools a legal way to disregard school children's rights guaranteed by the Fourth Amendment. Alex J. Barker, Vernonia School District 47J v. Acton: Defining the Constitutional Scope of Random Suspicionless Drug Testing in Interscholastic Athletics and Beyond, 5 WIDENER J. PUB. L. 445 (1996).

When Congress passed the Individuals with Disabilities Education Act (IDEA) in 1975, the law guaranteed all children, regardless of their mental or physical capacity, a free and appropriate public education. The Supreme Court ruled in Florence County School District Four v. Carter, 114 S. Ct. 361 (1993), that [*118] parents are entitled to public compensation for private school costs even if the private school has not been pre-approved by the state for special education purposes. Thus, the highest court has given parents affirmative control over their disabled child's education. Heather J. Russell, Florence County School District Four v. Carter: A Good "IDEA"; Suggestions for Implementing the Carter Decision and Improving the Individuals with Disabilities Education Act, 45 AM. U. L. REV. 1479 (1996).

It took four opinions and six years; however, in January 1995 the Texas Supreme Court declared constitutional the state school finance system that lets each property-wealthy school district decide how to reduce its wealth per student. Under the school finance system, Texas school children in both property-rich and property-poor districts have substantially equal access to funds necessary to meet accreditation requirements. Ellen Williams, Annual Survey of Texas Law: Education, 49 SMU L. REV. 901 (1996).

The Supreme Court invalidated Congress's Gun-Free School Zone Act of 1990 in United States v. Lopez. The Court held that Congress overreached its powers which are granted in the Commerce Clause of the United States Constitution. John M. Scott, Note, Constitutional Law -- Supreme Court Invalidates Federal Gun-Free Zones Act. United States v. Lopez, 115 S. Ct. 1624 (1995), 18 U. ARK. LITTLE ROCK L. J. 513 (1996).

Common schools offered a vehicle to promote cultural and individual interests of liberal philosophy among huge masses of immigrants to this country. Today, the common school has become the battleground of various cultural wars waged in society; these cultural wars often end up inside the courtroom. It is time to search for a new approach to education which is more accommodating to the various community standards and interests. Rosemary C. Salomone, Common Schools, Uncommon Values: Listening to the Voices of Dissent, 14 YALE L. & POL'Y REV. 169 (1996).

Generally, courts have demonstrated restraint when adjudicating evaluation procedures of higher education faculty members. Often, however, higher education institutions have been forced into courts for "innocent", but illegal, evaluation procedures. Colleges and universities should implement sound evaluation procedures to limit the need for legal involvement in these matters. John D. Copeland & John W. Murry, Jr., Getting Tossed from the Ivory Tower: The Legal Implication of Evaluating Faculty Performance, 61 MO. L. REV. 233 (1996).

[*119] Rosenberger v. Rector & Visitors of the University of Virginia considered a public university's right to withhold funding from a Christian activity's group because of its religious nature. The Supreme Court, in holding for the group, analyzed the issue by combining the Free Speech Clause and the

Establishment Clause into a natural doctrine which has provided for the emergence of unlimited views and ideas. Elizabeth M. Wheeler, Casenote, Rosenberger v. Rector & Visitors of the University of Virginia: Free Speech Clause and Establishment Clause Doctrines Work Together to Protect Individual Thought and Expression, 47 MERCER L. REV. 663 (1996).

Public schools increasingly design and implement programs to curtail rising trends in sexually related problems. Parents have a liberty interest in these programs and schools should be cautious to not abrogate these fundamental rights. Joseph W. Ozmer II, Note, Who's Raising the Kids: The Exclusion of Parental Authority in Condom Distribution at Public Schools, 30 GA. L. REV. 887 (1996).

To effectively protect students with learning disabilities, the Individuals with Disabilities Education Act (IDEA) promotes parental involvement in educating these children. When students' interests are not protected by disinterested or ineffectual parents, the IDEA requires the appointment of parental surrogates to ensure the procedural safeguards of the IDEA are adhered to by schools. Tara J. Parrillo, Comment, The Individuals with Disabilities Education Act (IDEA): Parental Involvement and the Surrogate Appointment Process, 74 OR. L. REV. 1339 (1995).

Divergent cultures and values, mixed with various educational philosophies, have resulted in heated debates among parents, students, and educators for decades. Many of these debates led to judicial intervention in the educational process. The community engagement dialogic model is a dispute resolution approach to effectively address the concerns of the interested parties while simultaneously curtailing judicial intervention. Michael A. Rebell & Robert L. Hughes, Schools, Communities, and the Courts: A Dialogic Approach to Education Reform, 14 YALE L. & POL'Y REV. 99 (1996).

According to most national surveys, student inflicted sexual harassment of other students continues to increase. Title IX monetary awards should be granted to victims of such harassment in limited circumstances. Sylvia Hermann Bukoffsky, School District Liability for Student Inflicted Sexual Harassment: School Administrators Learn a Lesson Under Title IX. 42 WAYNE L. REV. 171 (1995).

[*120] Parents are increasingly educating their children at home. Most states do not require the parents to hold a valid teaching certificate to meet the compulsory attendance statutes. However, the state of Michigan, along with a few other states, require parents to possess valid teaching certificates. Douglas G. McCray, Note, People v. Bennett: Are Teacher Certification Requirements for Secular Home Educators Constitutional?, 42 WAYNE L. REV. 259 (1995).

Fourth Amendment protections for students are in serious jeopardy in light of recent Supreme Court decisions. The Supreme Court upheld a school's random suspicious-less drug testing policy in Vernonia School District 475 v. Acton, without providing a compelling reason for doing so. This holding, along with others, demonstrates the current Court's move toward a narrowing of the scope of the Fourth Amendment protections. Darrel Jackson, Note and Comment, Expelled: The Constitution What Remains of Students' Fourth Amendment Rights?, 28 ARIZ. ST. L.J. 673 (1996).

Since enactment of Title IX over 20 years ago, "gender equity" issues in intercollegiate sports have been dominated by this complex law. College

officials and athletic administrators must understand the scope and application required by Title IX to decrease the risk of litigation over gender equity issues. Thomas S. Evans, 1996 Spring Symposium: Issues Facing College Athletics, Title IX and Intercollegiate Athletics: A Primer on Current Legal Issues, 5-SPG KAN. J.L. & PUB. POL'Y 55 (1996).

Thirty years after enactment of major Civil Rights legislation, vestiges of discrimination still exist in America culture and politic. The Eurocentric dominance of American education is a major force in the continual racial anxieties which exist in this country. Educators' resistance to diversification of the school curriculum has stood as a major blockage against desegregation efforts. Leland Ware & Melva Ware, Plessy's Legacy: Desegregating the Eurocentric Curriculum, 12 GA. ST. U. L. REV. 1151 (1996).

Language used to motivate athletes may not receive protection under the First Amendment. A coach's discretion to encourage student athletes to perform better does not allow the use of hate language, according to Dambrot v. Central Michigan University, 55 F. 3D 1177 (6th Cir. 1995). Michael P. Pompeo, Note, Constitutional Law -- First -- Athletic Coach's Locker Room Speech is not Protected Under First Amendment, Even Though University Policy is Found Unconstitutional -- Dambrot v. Central Michigan University, 55 F.3d 1177 (6th Cir. 1995), 6 SETON HALL J. SPORT L. 277 (1996).

[*121] Higher institutes of learning which were once strongly affiliated with various religious denominations increasingly battle encroaching secularization efforts. Many universities opine that the establishment of a national reputation cannot be obtained with a strong religious oriented curriculum. Despite the secularization trend, many universities try to promote their schools' religious mission via the hiring of sympathetic personnel and the recruitment of religious minded students. Robert John Araujo, S.J., "The Harvest is Plentiful, but the Laborers are Few": Hiring Practices and Religiously Affiliated Universities, 30 U. RICH. L. REV. 713 (1996).

Students have no fundamental liberty interest in participating in interscholastic athletics. To curtail recruitment efforts of student athletes by high schools, states may promulgate rules which are rationally designed to decrease such practices. Wm. Nicholas Chango, Jr., Note, Constitutional Law -- The Right to Participate in Interscholastic High School Athletics is not a Constitutionally Protected Right, Therefore, a Rule Suspending the Eligibility of Student-Athletes Who Transfer from One High School to Another Need Only be Rationally Related to a Legitimate State Objective -- Mississippi High School Activities Ass'n, Inc. v. Coleman, 631 So. 2d 768 (Miss. 1994), 6 SETON HALL J. SPORT L. 251 (1996).

Recent Pennsylvania decision regarding the application of the Teachers' Tenure Act is fair. The court, decided that a teacher's negligence did not rise to the level necessary to revoke tenure. In concluding this, the court looked to prior cases and the intent of the legislatures. Their decision is consistent with these sources. Patricia C. Camvel, Lauer v. Millville Area School District: The Commonwealth Court Develops the "Persistent Negligence" Standard for Teacher Tenure Appeals, 5 WIDENER J. PUB. L. 693 (1996).

After a two decade struggle to desegregate Philadelphia public schools the focus has changed to improving the segregated institutions. Problems with busing and segregated housing patterns have caused the Pennsylvania Human Relations

Commission to give up trying to desegregate schools. Their focus is now on providing equal educational opportunities at the segregated schools. Eric C. Milby, Pennsylvania Human Relations Commission v. School District of Philadelphia: The Commonwealth Court Revisits School Desegregation, and Decades of Failure Precipitates in a Change of Strategy, 5 WIDENER J. PUB. L. 703 (1996).

A symposium was held at William Mitchell College of Law to discuss the impact zealotry has had on academic freedom. Twelve academics spoke at the gathering. Topics discussed were McCarthyism, the student movement of the [*122] Sixties, and political correctness. Each topic was discussed in relation to its effect of stifling or encouraging academic development. Neil W. Hamilton, Foreword: Symposium on Zealotry and Academic Freedom, 22 WM. MITCHELL L. REV. 333 (1996).

All male military institute succeeded in convincing appellate court that the school was justified in remaining all-male to preserve diversity in educational choices. This article argues that the military institute's reasons for not allowing women are based on archaic stereotypes of gender roles and that the appellate court failed in not recognizing this. Lucille M. Ponte, United States v. Virginia: Reinforcing Archaic Stereotypes About Women in the Military Under the Flawed Guise of Educational Diversity, 7 HASTINGS WOMEN'S L.J. 1 (1996).

Stanford University's policy on Free Expression and Discriminatory Harassment was struck down by a trial court for violating students' First Amendment right to free speech. A critic of the policy explains why it undermined equality at the school and was rightfully struck down. Elena Kagan, When a Speech Code is a Speech Code: The Stanford Policy and the Theory of Incidental Restraints, 29 U.C. DAVIS L. REV. 957 (1996).

Stanford University's policy on Free Expression and Discriminatory Harassment was struck down by a trial court for violating students' First Amendment right to free speech. The drafter of the school's policy explains his reasoning behind the policy and why he believes it should not have been struck down. Thomas C. Grey, How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience, 29 U.C. DAVIS L. REV. 891 (1996).

Voucher programs are not a wise solution to the problems in public education. This article questions many of the myths behind education tuition vouchers. Myths discussed are the superiority of private schools and parent choice in voucher programs. This article argues for improvement within the public schools rather than an abandonment of them. Jeff Neurauter, On Educational Vouchers: Revisiting the Assumptions, Legal Issues, and Policy Perspectives, 17 HAMLINE J. PUB. L. & POL'Y 459 (1996).

LEVEL 1 - 53 OF 96 ITEMS

Kansas Journal of Law & Public Policy

Fall, 1995

5 Kan. J.L. & Pub. Pol'y 121

LENGTH: 13076 words

ARTICLE: ANTI-PORNOGRAPHY LEGISLATION AS CONTENT DISCRIMINATION UNDER R.A.V.

Brennan Neville

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A third-year law student at the University of Kansas School of Law in Lawrence, Kansas.

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SUMMARY:
... In 1984, the city of Indianapolis followed what was a popular trend and adopted an ordinance aimed at regulating pornography. ... This article assumes that, unlike Indianapolis, a city now combating pornography would attempt to avoid overbreadth problems by drafting its anti-pornography ordinance to cover only that which is also legally obscene. ... Rather, this article contemplates an ordinance that only proscribes materials in which the concepts of obscenity and pornography overlap--in other words, only obscene pornography and pornographic obscenity would be subject to regulation. ... Therefore, the ordinance did not regulate a subcategory of speech on the same basis that it regulated the larger category. ... For example, Professor MacKinnon, one of the drafters of the model anti-pornography ordinance, argues that obscenity laws deal with morality, while pornography laws deal with the political practice of harm to women. ... Assuming this prediction is correct and that the Court finds a sufficient expressive component in obscenity to protect it from content discrimination, the next step in assessing the constitutionality of an anti-pornography ordinance under the logic of R.A.V. ... exception could be made that this is a regulation of a subclass of unprotected speech for the same reason the larger category is regulable. However, this would not support the regulation of all pornography under the ordinance. ...

TEXT:

[*121] I. Introduction

In 1984, the city of Indianapolis followed what was a popular trend n1 and adopted an ordinance aimed at regulating pornography. n2 Indianapolis defined the term "pornography" to read much like the model ordinance drafted by Professor Catharine MacKinnon. n3 The city's efforts were unsuccessful, however, as the Seventh Circuit promptly declared the ordinance unconstitutional in American Booksellers Ass'n Inc. v. Hudnut. n4

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n1 Around the time of Indianapolis's experiment, similar legislation was also debated in a number of other cities. An antipornography ordinance was actually passed by the city council of Minneapolis, but was vetoed by the mayor. See James R. Branit, Reconciling Free Speech and Equality: What Justifies Censorship?, 9 HARV. J. L. & PUB. POL'Y 429, 431 n.11 (1986). A similar statute drafted by Prof. MacKinnon survived constitutional attack in Canada. See Butler v. Her Majesty the Queen, 1 S.C.R. 452, 453 (1992).

n2 American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316, 771 F.2d 323, 324 (7th Cir., 1985) aff'd mem. 457 U.S. 1001 (1986). The Indianapolis ordinance defined pornography as:

[T]he graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (1) Women are presented as sexual objects who enjoy pain or humiliation; or (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or (4) Women are presented as being penetrated by objects or animals; or (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

Id. (quoting Indianapolis Code @ 16-3(g)).

n3 See Catharine A. MacKinnon, Pornography, Civil Rights, and Speech, 20 HARV. C.R.-C.L. L. REV. 1, 22 (1985). Professor MacKinnon's model statute is described and discussed in the text accompanying note 93, infra.

n4 771 F.2d at 332.

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There are several constitutional difficulties with antipornography legislation of the type contemplated by Professor MacKinnon and enacted by Indianapolis. First, these ordinances might be subject to a vagueness challenge, because it is questionable whether terms such as "sexual objects" give potential defendants notice of the prohibited conduct. n5 Second, such legislation potentially silences constitutionally protected speech. Any book or movie depicting women in sexually explicit or subordinate positions could violate these ordinances even if it would not otherwise be deemed obscene. n6 These issues are beyond the scope of this article and will not be discussed further here. Yet another constitutional problem, central to the decision in American Booksellers, is that anti-pornography ordinances discriminate against speech, even if it is unprotected, on the basis of content.

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n5 See American Booksellers Ass'n v. Hudnut, 598 F. Supp 1316, 1337-38 (S.D. Ind. 1984), aff'd, 771 F.2d 323 (7th Cir. 1985).

n6 Id. at 1339 n.6 (noting that the Indianapolis ordinance could render actionable such non-obscene mainstream literature as the James Bond novels).

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The Supreme Court's recent landmark decision in R.A.V. v. St. Paul n7 could have significant ramifications for First Amendment jurisprudence, and likewise, for determining the constitutionality of an anti-pornography ordinance. In R.A.V., the Court declared that a "hate crimes" ordinance criminalizing certain forms of fighting words was content-discriminatory and therefore unconstitutional, even though fighting words were thought to be unprotected by the First Amendment. n8 The Supreme Court, if presented with an anti-pornography ordinance challenge, might expand the R.A.V. rationale and strike down the ordinance as content-discriminatory, even if the ordinance is limited to pornography that is legally obscene and thought to be beyond the protection of the First Amendment.

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n7 U.S. , 112 S. Ct. 2538 (1992).

n8 Id. at 2549.

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Part II of this article explores the logic the R.A.V. Court used to conclude that the regulation of fighting words on a content-discriminatory basis is unconstitutional. n9 Part III discusses how a typical anti-pornography ordinance might be drafted and how a court would likely analyze its constitutionality. n10 Part IV discusses the American Booksellers Ass'n, Inc. v. Hudnut n11 decision, in which the Seventh Circuit invalidated the Indianapolis ordinance. n12 Part V analyzes the Supreme Court's treatment of the First Amendment category of obscenity. n13 Part VI examines how the Court would likely rule on the constitutionality of anti-pornography legislation. n14 Finally, Part [*122] VII discusses the likely result with an eye toward public policy. n15

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n9 See infra notes 16-91, and accompanying text.

n10 See infra notes 92-122, and accompanying text.

n11 771 F.2d 323 (7th Cir. 1985).

n12 See infra notes 122-36, and accompanying text.

n13 See infra notes 137-49, and accompanying text.

n14 See infra notes 150-86, and accompanying text.

n15 See infra notes 187-88, and accompanying text.

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This article assumes that, unlike Indianapolis, a city now combating pornography would attempt to avoid overbreadth problems by drafting its anti-pornography ordinance to cover only that which is also legally obscene.

n16 In addition, a city guided by precedent would not proscribe everything that is legally obscene and obscene pornography separately, inasmuch as that would be redundant. Rather, this article contemplates an ordinance that only proscribes materials in which the concepts of obscenity and pornography overlap--in other words, only obscene pornography and pornographic obscenity would be subject to regulation. In this way, the ordinance will be analogous to the St. Paul ordinance at issue in R.A.V., which prohibited only those fighting words that the city declared "hate speech." n17 The importance of these qualifications will become apparent shortly.

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n16 If not, the ordinance would clearly be unconstitutional without necessitating a content-discrimination analysis. Cf. American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316, 1332 (S.D. Ind. 1984) ("[T]he proscriptions in the Ordinance intrude with defendants' explicit approval into areas of protected speech. Under ordinary constitutional analysis, that would be sufficient grounds to overturn the Ordinance . . . .").

n17 See R.A.V. v. St. Paul, 112 S. Ct. 2538, 2541 (1992).

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II. R.A.V. and Content Discrimination

In R.A.V., the Supreme Court considered the constitutionality of the St. Paul Bias Motivated Crime Ordinance, which prohibited selected hate crimes where the victims were targeted on the basis of such characteristics as race, gender, or religion. n18 Although a number of prior cases had firmly established the principle that the government could not regulate protected speech on a content-discriminatory basis, n19 this was the first time the Supreme Court addressed the constitutionality of content-based regulation within a so-called "unprotected" category of speech, such as fighting words, n20 which have historically been defined by the Court as those that by their very utterance cause a breach of the peace. n21 The petitioner in R.A.V. was a teenager who burned a cross on the lawn of an African-American family in violation of the ordinance. n22 The trial court dismissed this particular count on overbreadth grounds, but the Minnesota Supreme Court reversed, holding that the ordinance was limited to constitutionally proscribable fighting words. n23 The Minnesota Supreme Court also concluded that the ordinance was not impermissibly content-discriminatory. n24

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n18 Id. at 2541 (citing St. Paul, Minn. Legis. Code @ 292.02 (1990)). The statute read as follows:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.

n19 Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

n20 R.A.V., 112 S. Ct. at 2545 n. 5.

n21 Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include . . . 'fighting' words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.") (citations omitted).

n22 R.A.V., 112 S. Ct. at 2541.

n23 Id. (citing In re Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991)).

n24 Id.

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R.A.V.: The Opinion of the Court

In a 5-4 opinion authored by Justice Scalia, the United States Supreme Court reversed the Minnesota Supreme Court and held that the ordinance was facially unconstitutional because it prohibited "otherwise permitted speech solely on the basis of the subjects the speech addresses." n25 That is, fighting words were not criminalized unless they also qualified as "hate speech" under the ordinance by addressing one of the enumerated subjects: race, color, creed, religion, or gender. The majority found it unnecessary to discuss whether the ordinance was unconstitutionally overbroad. n26 In three separate opinions, Justices White, Blackmun, Stevens, and O'Connor concurred only in the result. n27 The concurring justices would have also reversed R.A.V.'s conviction, but would have done so on overbreadth grounds.

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n25 Id. at 2542.

n26 Id.

n27 See id. at 2550 (White, J., concurring in the judgment); id. at 2560 (Blackmun, J., concurring in the judgment); id. at 2561 (Stevens, J., concurring in the judgment).

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In holding the ordinance unconstitutional, the majority began with the premise that the First Amendment generally prohibits the government from proscribing speech on the basis of content. n28 Content discrimination occurs when the government "restrict[s] expression because of its message, its ideas, its subject matter, or its content." n29 Thus, if speech regulation may only be justified by reference to the message of the speech, the regulation may be said to be content-discriminatory. n30 The St. Paul ordinance clearly regulated speech based on its content, the Court reasoned, because the harms caused by the expression (anger, resentment, alarm) were directly related to the content of the expression (words of racial or similar bias); n31 but for the hateful content of the speech, these harms would not occur.

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n28 Id. at 2542 (citing Cantwell v. Connecticut, 310 U.S. 296, 309-11 (1940); Texas v. Johnson, 491 U.S. 397, 406 (1989)).

n29 Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

n30 See generally Geoffrey R. Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189 (1983).

n31 R.A.V., 112 S. Ct. at 2548.

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The Court then submitted that fighting words have historically been subject to regulation because of their nonexpressive component, not because they are entirely unexpressive. n32 Indeed, fighting words are often quite expressive. To support the proposition that even lowly fighting words may enjoy First Amendment protection, the Court found it significant that previous decisions had held that fighting words constituted "no essential part of any exposition of ideas," n33 rather than that the speech constituted "no part of the expression of ideas." n34 Because they may have an expressive component, fighting words may only be regulated on the basis of their non-expressive element (their tendency to provoke violence), not on the basis of any expressive component (the message being proclaimed). n35 The Supreme Court thus held that, contrary to the sweeping language of established precedent, "unprotected" fighting words are not really unprotected. For content discrimination purposes, the expressive component is no different than that of protected speech. n36 Fighting words, although proscribable on the basis of their non-expressive component, cannot "be made the vehicles for content discrimination" on the basis of their expressive components because it disagrees with the message being expressed. n37 Content-based discrimination is dangerous because the government will be perceived as driving certain ideas out of the "marketplace" and favoring one viewpoint among several. n38 In the Court's eyes, this danger is apparently as significant within a so-called unprotected category of speech like fighting words as it is in speech afforded full constitutional protection.

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n32 Id. at 2548-49.

n33 Id. at 2544 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1941)) (emphasis in original).

n34 Id. (emphasis in original).

n35 Id. at 2545.

n36 Cf. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

n37 R.A.V., 112 S. Ct. at 2543.

n38 Id. at 2545.

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In situations where there is no danger of the government establishing a preferred viewpoint, there would seem to be no reason to prohibit the government from regulating speech on a content-discriminatory basis. n39 The Court accordingly enumerated several exceptions to its new general rule. The first exception would permit the government to regulate a subset of proscribable speech on the basis of content, provided that it does so on the same basis that makes the larger category of speech regulable. n40 [*123] As an example, if a particular form of expression is proscribable because it causes certain harms, then a subset of that expression may be regulated on a content-discriminatory basis if the subset is particularly harmful. In such cases, there is no danger that the government is favoring one viewpoint over another; rather, the government would really be focusing on the harm caused by the speech, not its content. To illustrate this distinction, the Court suggested that there would be no constitutional problem with a state prohibiting particularly prurient obscenity, whereas it would be impermissible to prohibit only obscenity that proclaimed a disfavored political message. n41

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n39 Id.

n40 Id. at 2545-46.

n41 Id. at 2546.

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A second permissible form of content discrimination occurs when the government incidentally regulates a subclass of proscribable speech in an effort to regulate the secondary effects particularly associated with that subclass. n42 When the government targets only secondary effects, it is not acting out of hostility to a particular viewpoint. Thus, there is no danger that the government will appear to be regulating unpopular views. n43 By way of example, this exception would justify the zoning of adult movie theaters into certain areas of a city because of the harmful secondary effects for which they are thought to be responsible. n44

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n42 Id.

n43 Id. at 2545-46.

n44 Id. at 2549 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

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The final exception to the prohibition against content discrimination is really a simple catch-all. n45 The Court did not elaborate much on the point, aside from suggesting that the government may regulate proscribable speech, even without a stated content-neutral basis, so long as there is no reasonable possibility that it is doing so out of hostility toward the particular

viewpoint being expressed. n46 As an example, the Court suggested that there would be no First Amendment interest offended by a law that prohibited only obscene movies featuring blue-eyed actresses but leaving other movies unregulated. n47

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n45 Id. at 2547.

n46 Id.

n47 Id.

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Turning to the St. Paul ordinance, the Court observed that it was not only content-discriminatory; it was viewpoint-discriminatory as well. n48 Not all words likely to cause a breach of the peace were forbidden, only those that expressed a certain disfavored opinion. As a result, while certain enumerated types of fighting words were off-limits to a speaker, the speaker's opponent could reply using a variety of epithets that targeted a characteristic not protected by the city's hate crimes statute. The city thus "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." n49 For example, because it would not provoke religious violence, a speaker could call his opponent a misbegotten "anti-Catholic bigot[]." n50 His opponent could not, however, say the same thing about "papists." n51

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n48 Id.

n49 Id. at 2548.

n50 Id.

n51 Id.

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The Court then concluded that none of the exceptions to the general rule applied to the St. Paul ordinance. n52 With respect to the first exception, the Court reiterated that fighting words are categorically excluded from First Amendment protection because of the way they are used by a speaker to express an idea, not because of the idea itself. n53 St. Paul's ordinance, on the other hand, proscribed particularly offensive messages, rather than those that were communicated in a particularly intolerable manner (i.e., in a way that would likely breach the peace). n54 Therefore, the ordinance did not regulate a subcategory of speech on the same basis that it regulated the larger category. Likewise, the St. Paul ordinance could not fall within the secondary effects exception to the general rule. n55 The ordinance was not directed at the proper sort of secondary effects; the emotive impact of a form of expression and the reaction of a listener are not truly "secondary effects." n56 The third exception, the catch-all category, was also inapplicable, because the city clearly was acting to establish a favored viewpoint, that of tolerance and

equality. n57

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n52 Id. at 2549.

n53 Id. at 2548-49.

n54 Id. at 2549.

n55 Id.

n56 Id. (citing Boos v. Barry, 485 U.S. 312, 321 (1988)).

n57 Id.

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Because the ordinance was impermissibly content-discriminatory and did not fall under any exception, it was presumed unconstitutional. n58 The Court then struck it down under strict scrutiny. n59 While conceding that St. Paul's interest in allowing its citizens to live in peace was a compelling one, the Court found that the ordinance was not necessary to achieve these goals. n60 This was evidenced by a variety of adequate content-neutral alternatives (such as a complete ban on all fighting words) at the city's disposal. n61 Somewhat curiously, the Court suggested that completely banning all fighting words would be less restrictive than proscribing only certain types. n62 Even though it would actually sweep in more unprotected speech, a total ban would not burden any particular viewpoint. n63 It would be more odious to allow the city to target only certain viewpoints by "imposing unique limitations upon speakers who . . . disagree." n64

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n58 Id. at 2550.

n59 Id. at 2549-50.

n60 Id. at 2550.

n61 Id.

n62 Id.

n63 Id.

n64 Id.

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R.A.V.: The Concurrences

The majority opinion provoked three separate concurring opinions, each reading more like a dissent than a concurrence. Concurring only in the Court's judgment, Justice White (joined by Justices Blackmun and O'Connor, and in part

by Justice Stevens) stated that he would also have held the ordinance unconstitutional, but he felt that the Court should have disposed of the case on overbreadth grounds instead.' n65 Justice White preferred an overbreadth approach because the ordinance criminalized [*124] protected expression. n66

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n65 Id. (White, J., concurring in the judgment).

n66 Id.

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The first disagreement between Justice White and the majority centered around the majority's characterization of fighting words as having First Amendment value. n67 Of course, this was a crucial point, because without this premise, the majority's analysis would collapse. Justice White argued that prior decisions had clearly established that some forms of expression were afforded no protection by the Constitution. n68 In certain cases, such as fighting words, the First Amendment simply does not protect expression because the "expressive content is worthless or of de minimis value to society." n69 The Court's R.A.V. decision, according to Justice White, rejected the categorical approach to First Amendment jurisprudence by protecting categories of expression previously held to be undeserving of any protection. n70 Furthermore, Justice White argued it was simply nonsense to hold that the government may constitutionally regulate an entire category of speech based on its content, but it cannot treat subclasses differently; by definition, expression within a subclass is also unprotected. n71 This disagreement between Justice White and Justice Scalia on this point is rather like the well-known "half empty, half full" characterization. Justice Scalia argued that even though fighting words may not contribute much to the public good, their expressive content protects them against content discrimination. n72 Justice White, on the other hand, appeared to espouse the "half empty" theory. That is, because fighting words are of de minimis value, they are completely unprotected under the Chaplinsky rule. n73

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n67 Id. at 2551-52.

n68 Id. at 2551.

n69 Id. at 2552 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

n70 Id.

n71 Id. at 2553.

n72 See id. at 2544-45.

n73 Id. at 2551-52 (citing Chaplinsky, 315 U.S. at 571-72).

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In a second disagreement, Justice White argued that even if the St. Paul ordinance was content-discriminatory, it would satisfy strict scrutiny because it was a narrowly tailored means to achieve a compelling governmental interest. n74 Justice White observed that under the majority's application of strict scrutiny, a narrowly drawn statute such as St. Paul's could never survive constitutional review if more speech could be proscribed. n75 Rather than viewing it as a form of content discrimination, Justice White viewed the ordinance as the least restrictive means necessary to advance a compelling interest, because it only regulated speech where there was a particular need to do so. n76 In effect, the majority's approach meant that regulating more speech is, paradoxically, less restrictive. n77 Justice White argued that after R.A.V., lawmakers are left with the unpalatable option of either "enacting a sweeping prohibition on an entire class of speech (thereby requiring regulation for problems that do not exist) or . . . not legislating at all." n78

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n74 Id. at 2554 (citing Simon & Schuster, Inc. v. New York Crime Victims Bd., 502 U.S. 105, 118 (1991)).

n75 Id. at 2554.

n76 Id.

n77 Id.

n78 Id. at 2555.

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Finally, Justice White took issue with both the concept and the application of the exceptions to the Court's new rule. He was particularly troubled by the exception under which a subset of a regulable category of expression could be uniquely regulated on the very basis the larger category is regulable. n79 Justice White argued that this exception would actually save St. Paul's ordinance because the reason behind the city's ban on certain fighting words was the exact reason that these words are beyond First Amendment protection. n80 Fighting words enjoy no First Amendment protection because they are likely to provoke violence. Certainly, racial epithets are more likely to cause a breach of the peace than an insult based on the recipient's union membership, to use an example provided by the Court. n81 Thus, Justice White argued, this exception would swallow the majority's general rule because the enumerated categories of fighting words were the ones most likely to provoke a violent response. n82 As far as the secondary effects exception was concerned, Justice White argued that a simple redrafting with a general reference to discrimination would save the ordinance. n83 Justice White presumably interpreted the majority opinion to suggest that any reference to discrimination would bring St. Paul's statute into line with the adult theater cases, where the impact upon speech was merely an unintended by-product of regulating the secondary effect of the speech. n84 A redrafting of the St. Paul ordinance would not affect its substance, merely its form. This prompted Justice White's fear that a city could regulate speech through subterfuge so long as it could identify some preventable contentneutral harm.

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n79 Id. at 2556.

n80 Id.

n81 See id. at 2547.

n82 Id.

n83 Id. at 2557-58.

n84 See, e.g., City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

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Justice Blackmun also wrote a brief opinion concurring in the Court's judgment. n85 Like Justice White, Justice Blackmun would have decided the case on overbreadth grounds. n86 Justice Blackmun saw this decision as a general weakening of the First Amendment, noting that "if all expressive activity must be accorded the same protection, that protection will be scant." n87

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n85 R.A.V. v. St. Paul, 112 S. Ct. 2538, 2560 (1992) (Blackmun, J., concurring in the judgment).

n86 Id. at 2560-61.

n87 Id. at 2560.

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Finally, Justice Stevens, joined in part by Justices White and Blackmun, authored an opinion concurring in the Court's judgment. n88 Although he, too, would have held the ordinance unconstitutionally overbroad, Justice Stevens wrote separately to [*125] express his general reservations about the categorical approach to the First Amendment. n89 According to Justice Stevens, the "quest for absolute categories of 'protected' and 'unprotected' speech [is] ultimately futile." n90 He also concluded that, as a matter of First Amendment jurisprudence, "subject matter restriction on proscribable speech is constitutional." n91

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n88 Id. at 2561 (Stevens, J., concurring in the judgment).

n89 Id.

n90 Id.

n91 Id.

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III. Anti-Pornography Legislation

An anti-pornography ordinance could be held unconstitutional in much the same way as the Court struck down St. Paul's hate crimes ordinance in R.A.V. n92 It is important to first understand how drafters of anti-pornography ordinances define the term pornography. Pornography, as it is used here, is a term of art with a meaning that differs somewhat from the popular usage. An anti-pornography statute typically defines pornography as follows:

[T]he graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures of sexual submission, servility or display; or (vi) women's body parts -- including but not limited to vaginas, breasts, and buttocks -- are exhibited, such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual. n93

This definition is similar to the Indianapolis ordinance at issue in American Booksellers Ass'n, Inc. v. Hudnut. n94

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n92 See id. at 2550.

n93 See MacKinnon, supra note 3, and accompanying text. The comparable portion of the Indianapolis anti-pornography ordinance is quoted in note 2, supra.

n94 598 F. Supp. 1316, 1320-25 (S.D. Ind., 1984), aff'd, 771 F.2d 323 (7th Cir., 1985), aff'd mem. 457 U.S. 1001 (1986).

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Proponents of anti-pornography legislation offer several justifications for these laws. Some justify this legislation because the production of certain kinds of pornography may harm the "participants," who are often coerced into its production. n95 Furthermore, many proponents justify the regulation of pornography by citing a possible causal connection between pornography and violence against women, such as rape. n96 Antipornography advocates often claim that there is a statistical causation between pornography and violence, although this belief is certainly disputed. n97 Finally, some seek to regulate pornography because it "perpetuates the social subordination of women as a class." n98

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n95 See, e.g., Cass R. Sunstein, Pornography and the First Amendment, 1986 DUKE L.J. 589, 595-96 (1986).

n96 See, e.g., id. at 597-601; MacKinnon, supra note 3, at 12 n.20.

n97 Compare Sunstein, supra note 95, at 597 ("The existence of pornography increases the aggregate level of sexual violence.") and Cass R. Sunstein, Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy), 92 COLUM. L. REV. 1, 24 (1992) ("There is a causal connection between pornography and violence against women.") with Branit, supra note 1, at 457 ("Thus, there is not enough evidence to establish a direct causal link between violent pornography and violent sex crime.") and Dumas v. City of Dallas, 648 F. Supp. 1061, 1065 n.12 (N.D. Tex. 1986).

n98 See, e.g., Note, Anti-Pornography Laws and First Amendment Values, 98 HARV. L. REV. 460, 477 (1984).

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As a basic matter of First Amendment jurisprudence, government regulation targeting speech is invalid unless the target category of speech is not afforded full First Amendment protection or the regulation satisfies strict scrutiny. n99 The Supreme Court has not passed on the existence of a pornography exception to the First Amendment's prohibition on regulation of speech. n100 Therefore, pornography may be constitutionally regulated only when it either fits into other proscribable categories or when the regulation satisfies the rigors of strict scrutiny. n101 Some scholars, n102 contending that pornography is the cause of a number of harms to women, argue that pornography should be regulated as its own separate category of expression beyond the protection of the First Amendment, much like obscenity, n103 fighting words, n104 or libel. n105 Similarly, some argue that pornography is harmful in and of itself, and therefore should be regulable on that basis. n106 Whatever the arguments for or against making another exception to the First Amendment, the fact remains that the Supreme Court has not yet recognized such an exception. n107 Therefore, this article discusses anti-pornography legislation under the law as it stands today and will not discuss the merits of establishing a separate category for pornography. In other words, this will be a discussion of the "is" rather than the "ought" of the law. n108 Accordingly, this article will discuss the regulation of pornography when it overlaps with recognized exceptions to the First Amendment. n109

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n99 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW @ 12-2 (1988).

n100 John F. Wirenius, Giving the Devil the Benefit of Law: Pornographers, the Feminist Attack on Free Speech, and the First Amendment, 20 FORDHAM URB. L.J. 27 (1992).

n101 Branit, supra note 1, at 437.

n102 See, e.g., Note, supra note 98, at 476; Cass R. Sunstein, Words, Conduct, Caste, 60 U. CHI. L. REV. 795, 809 (1993). Contra Geoffrey R. Stone, Anti-Pornography Legislation as Viewpoint-Discrimination, 9 HARV. J. L. & PUB. POL'Y 461, 477-79 (1984).

n103 See, e.g., Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).

n104 See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

n105 See, e.g., Gertz v. Welch, 418 U.S. 323 (1974).

n106 See, e.g., Marianne Wesson, Girls Should Bring Lawsuits Everywhere . . . Nothing Will be Corrupted: Pornography as Speech and Product, 60 U. CHI. L. REV. 845, 868 (1993). But see American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985) ("If pornography is what pornography does, so is other speech.").

n107 See Wirenius, supra note 101, at 37.

n108 Elena Kagan, Regulation of Hate Speech and Pornography After R.A.V., 60 U. CHI. L. REV. 873, 877 (1993).

n109 Professor MacKinnon would apparently reject the First Amendment entirely as a means of addressing the constitutionality of anti-pornography legislation. See Michael K. Curtis, Critics of "Free Speech" and the Uses of the Past, 12 CONST. COMMENT. 29, 43 (1995).

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Pornography could reasonably be analyzed under three of the currently recognized categorical exceptions to First Amendment protection: incitement to commit illegal acts, group libel, and obscenity. n110 It would probably be of little use to analyze pornography as an incitement to commit illegal acts, because few people would contend that even the most violent pornography satisfies the Brandenburg v. Ohio n111 test. Even assuming that pornographers intend to cause harm, it is difficult to contend that pornography is likely to incite imminent lawless action on the part of the audience. The group libel exception would probably not be very helpful, either; the only Supreme Court case recognizing it as unprotected speech, Beauharnais v. Illinois, n112 is no longer considered good law. n113 Obscenity would probably be the most viable First Amendment exception under which to analyze pornography, although certainly much pornography is not "obscene" under the legal definition and a great deal of obscenity is not pornographic. Something which would be legally obscene by constitutional standards would not be pornographic unless it depicts women in a sexually explicit and subordinate position. n114 Likewise, materials actionable under the model anti-pornography ordinance are not necessarily obscene unless they satisfy the Miller v. California n115 standard.

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n110 See Branit, supra note 1, at 437.

n111 395 U.S. 444, 447 (1969) (to be regulable as an incitement to commit illegal acts, speech must be both "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action.").

n112 343 U.S. 250 (1952).

n113 See, e.g., TRIBE, supra note 99 at @ 12-17 ("Subsequent cases seemed to have sapped Beauharnais of much of its force."). Professor Tribe's opinion on this issue is widely shared, but is not universal. One author argues that the group libel doctrine is not only alive and well, but that it would be the best

way to defend the constitutionality of an anti-pornography ordinance. See Jerome O'Callaghan, Pornography and Group Libel: How to Solve the Hudnut Problem, 27 NEW ENG. L. REV. 363 (1992).

n114 Cf. note 93, supra, and accompanying text.

n115 413 U.S. 15, 24 (1973) (only those works "which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole do not have serious literary, artistic, political, or scientific value" may be constitutionally regulated as obscene). Miller would require that challenged materials appeal to prurient desires, be offensive to an average person applying community standards, and be without serious value. See Note, supra note 98, at 466.

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Unfortunately for those who support the regulation of pornography, this construction will greatly limit the impact of the [*126] legislation. n116 First of all, on a practical level, a great deal of pornography -- that which is not legally obscene -- will not be covered. Furthermore, on a philosophical level, obscenity is neither a sufficient nor a desirable basis for attacking pornography. n117 For example, Professor MacKinnon, one of the drafters of the model anti-pornography ordinance, argues that obscenity laws deal with morality, while pornography laws deal with the political practice of harm to women. n118 Thus, an attack on only that pornography which is obscene, or vice versa, would not adequately address the harms of pornography. n119 Other scholars contend, however, that the obscenity framework may be a workable way to regulate pornography. n120 While not all pornography is legally obscene, some is. Moreover, Miller's "without serious value" requirement may not be as large an impediment to the regulation of obscenity as it might seem. n121 Furthermore, it is possible that the obscenity doctrine may evolve over time and that harms thought to be caused to women may be considered offensive by community standards. n122 As community standards evolve, more pornography will become "obscene" and fall under the anti-pornography statute.

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n116 See Note, supra note 98, at 466.

n117 Id. at 467.

n118 MacKinnon, supra note 3, at 21. See also Sunstein, supra note 102, at 805.

n119 See MacKinnon, supra note 3, at 21.

n120 See, e.g., Kagan, supra note 108, at 897; Curtis, supra note 109, at 52.

n121 See Curtis, supra note 109, at 52 (observing that the Miller standard has rarely protected materials when the issue has been litigated).

n122 Kagan, supra note 108, at 893-96.

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IV. American Booksellers

The decisions of the district court and the Seventh Circuit Court of Appeals in American Booksellers Ass'n, Inc. v. Hudnut n123 are the most celebrated rulings on the constitutionality of anti-pornography legislation. In American Booksellers, the district court held the Indianapolis ordinance unconstitutional on a number of grounds. First, several of the ordinance's definitions and terms were unconstitutionally vague, thus violating potential defendants' due process rights. n124 More importantly, however, because the ordinance was not limited to legally obscene materials, it impermissibly suppressed protected speech. n125 The district court declined to create a new exception to the First Amendment for pornography in order to save the legislation. n126 The district court did not address whether the Indianapolis ordinance was content-discriminatory.

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n123 771 F.2d 323 (7th Cir. 1985).

n124 Id. at 1337-39.

n125 American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316, 1331-32 (S.D. Ind. 1984).

n126 Id. at 1332-37.

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The Seventh Circuit took a different tack. The appellate court likened the definition of pornography to "thought control," because whether or not speech was permissible depended on the speaker's perspective. n127 That is, expression depicting women in an approved way was permitted, no matter how explicit, while expression that portrayed women in a subordinate role was prohibited, regardless of any redeeming value. n128 The court conceded that pornography may condition some into accepting its message, but observed that this in fact demonstrates pornography's First Amendment expressive value. n129 The court noted that other forms of speech may influence the attitudes of society -- even insidious racist or violent speech -- yet these are still protected. n130 Any other option would leave "the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us." n131 The Seventh Circuit was unwilling to start down that treacherous road.

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n127 American Booksellers, 771 F.2d at 328.

n128 Id. at 325.

n129 Id. at 329.

n130 Id. at 330.

n131 Id.

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The American Booksellers court also took pains to differentiate between speech and its message. It observed that an image of pain is not the same thing as pain itself. n132 This is a critical distinction because some supporters of pornography legislation contend that pornography is more than just the advocacy of discrimination; it is discrimination in and of itself. n133 Finally, the court rejected the argument that pornography is lowvalue speech. n134 The city sought to regulate pornography because it negatively influences social attitudes, but the court correctly observed that this precludes the speech from being low-value. n135

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n132 Id. The court went on to state that "a book about slavery is not itself slavery, or a book about death by poison a murder."

n133 See, e.g., MacKinnon, supra note 3, at 22 ("We define pornography as a practice of sex discrimination . . . .").

n134 American Booksellers, 771 F.2d at 331.

n135 Id.

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Whether an anti-pornography statute, limited to regulating obscenity, would survive the reasoning of R.A.V. turns in part on the position the Supreme Court would take regarding any First Amendment expressive value of obscenity. This was a crucial determination in R.A.V. Because fighting words were only regulable on the basis of their non-expressive component, they were not completely invisible to the First Amendment. n136 Content discrimination within that "unprotected" category was therefore impermissible. If obscenity as a category has no value, then it would seem that the First Amendment would pose no barrier to the regulation of subset categories, such as pornographic obscenity, based on content. After all, if obscenity is not even "speech," there would be no danger that the government would be establishing a preferred viewpoint. It is thus crucial to determine if "no value" speech really means no value, or if it is merely a shorthand way of saying "regulable."

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n136 See R.A.V. v. St. Paul, 112 S. Ct. 2538, 2543-45 (1992).

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V. The Supreme Court and Obscenity

As discussed previously, n137 anti-pornography legislation would most likely be analyzed under the obscenity exception to the First Amendment. The history of obscenity regulation is long and tortured. Roth v. United States n138 was the first salvo in this constitutional battle. Roth explicitly held that obscenity is outside the First Amendment. n139 The Court reached this conclusion by first observing that, at the time the First Amendment was adopted, numerous states held obscenity outside the protection intended for speech. n140 In addition, the Court relied on dicta from Chaplinsky v. New Hampshire, n141 which stated that certain categories of speech, including obscenity, constitute "no essential

part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." n142 Implicitly, obscenity must be entirely without social importance. n143 The current statement of obscenity law is found in Miller v. California, n144 which held that for a work to be legally obscene it must be patently offensive by community standards, appeal to prurient interests, and be without serious social, literary, artistic, or political value. n145

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n137 See supra notes 110-22, and accompanying text.

n138 354 U.S. 476 (1957).

n139 Id. at 484.

n140 Id. at 482.

n141 315 U.S. 568, 571-72 (1941).

n142 Roth, 354 U.S. at 485 (quoting Chaplinsky, 315 U.S. at 572).

n143 Id. at 485.

n144 413 U.S. 15 (1973).

n145 Id. at 24.

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[*127] The definition of obscenity underwent a number of modifications between Roth and Miller. A significant development for the purposes of this article is the changing First Amendment value of obscenity. Roth held that obscenity was regulable because it had no redeeming value. Subsequently, in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, n146 the Court held that "[a] book cannot be proscribed unless it is found to be utterly without redeeming social value." n147 Finally, in Miller, the Supreme Court completely abandoned the "utterly without redeeming social value" requirement in favor of regulating only that expression lacking serious value. n148 As Professor Laurence Tribe has observed, the Court "moved from a view in which the obscene was unprotected because utterly worthless (Roth), to an approach in which the obscene was unprotected if utterly worthless (Memoirs), to a conclusion in which obscenity was unprotected even if not utterly without worth (Miller)." n149 The Supreme Court has never directly addressed the value of obscenity when discussing the prohibition against content discrimination. When subsequent cases employed Roth's "outside the First Amendment" language, it was in the context of complete regulation of obscenity, with no discussion of obscenity's expressive and nonexpressive components. For purposes of an arguably content discriminatory statute under R.A.V., however, the distinction is critical.

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n146 383 U.S. 413 (1966).

n147 Id. at 419.

n148 Miller, 413 U.S. at 22.

n149 TRIBE, supra note 99, at @ 12-16 (emphasis in original).

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VI. Anti-Pornography Legislation as Content Discrimination under R.A.V.

Dicta in R.A.V. suggests that perhaps a viewpoint discrimination argument similar to the one accepted by the Court in the fighting words context would also be successful if used to challenge an anti-pornography ordinance. For example, the Court observed that if the government were able to freely regulate unprotected speech on the basis of content, "a city council could enact an ordinance prohibiting only those legally obscene works that contain a criticism of the city government." n150 In addition, the Court hinted that although a state could prohibit only the most offensive types of obscenity, it could not categorically ban obscene materials that contain disfavored political messages. n151 Therefore, obscenity would be regulable on the basis of a nonexpressive component (its prurience), but not on the basis of any expressive elements (such as a message it espouses). Finally, the Court in passing dismissed the traditional expression that obscenity is not speech at all by calling it "shorthand" and not literally true. n152 These examples, while dicta, are a strong indication that the Supreme Court has contemplated that obscenity would also be protected from content-based discrimination.

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n150 R.A.V. v. St. Paul, 112 S. Ct. 2538, 2543 (1992).

n151 Id. at 2546.

n152 Id. at 2543.

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Beyond dicta, it is unclear how the Court would rule on a challenge to an anti-pornography ordinance. The result would depend largely on the First Amendment value the Court would assign to obscenity. A persuasive argument can be made that obscenity as a category has even less value than the fighting words at issue in R.A.V. Roth and a number of subsequent cases explicitly hold that obscenity is outside the First Amendment. n153 Moreover, some scholars contend that obscenity is not speech at all because there is no exchange of ideas. n154 Following this argument, obscenity is not a depiction of sex; it is sex. n155 As pure conduct, therefore, obscenity may be freely regulated, because the First Amendment simply is not implicated.

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n153 See, e.g., Roth v. United States, 354 U.S. 476, 485 (1957) ("Obscenity is not within the area of constitutionally protected speech.").

n154 See, e.g., Frederick Schauer, Speech and "Speech" -- Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 GEO. L.J. 899 (1979).

n155 Id.

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Furthermore, the cross-burning at issue in R.A.V. arguably contained more First Amendment expressive value than obscenity generally does. It would not be unreasonable to contend that burning a cross has some political overtones, perhaps as a comment on race relations in St. Paul. Adding political overtones to otherwise non-expressive activity might tip the scale in favor of finding expressive content in the cross burning. It might be more difficult to argue that obscenity in general contains political commentary (although certainly in some instances it might) that would "up" its First Amendment value. It seems intuitively more difficult to argue that obscenity is designed to further the goals of the First Amendment, such as a vehicle for the discovery of truth, n156 maintenance of the democratic political process, n157 or the attainment of self-realization. n158 If this is so, then perhaps the Court might be reluctant to extend R.A.V.'s logic outside the unique facts of that case.

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n156 This "marketplace of ideas" theory is usually attributed to Justice Holmes. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

n157 See, e.g., Robert Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 20 (1971).

n158 See, e.g., Martin Redish, The Value of Free Speech, 130 U. PA. L. REV. 591 (1982).

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On the other side of the coin, it is possible to break down obscenity into expressive and non-expressive components like the R.A.V. Court did with fighting words. n159 Obscenity clearly contains a non-expressive element; namely the intent to arouse or shock the user. There may also be an expressive element to obscenity, though. Nearly any movie or book, for example, contains at least some artistic value, even if it has no "serious literary, artistic, political, or scientific value" under Miller. n160 Just because the work is offensive does not mean it has no value [*128] whatsoever. n161

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n159 See R.A.V. v. St. Paul, 112 S. Ct. 2538, 2543 (1992).

n160 See Miller, 413 U.S. at 24 (emphasis added).

n161 See Jeffrey M. Shaman, The Theory of Low-Value Speech, 48 S.M.U. L. REV. 297, 306 (1995).

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Thus, it is unclear exactly how the Court would characterize obscenity if it were confronted with an R.A.V.-type challenge to an anti-pornography ordinance. It does seem possible that the Court would find that obscenity is not completely invisible to the First Amendment. It follows the Court might hold that the prohibition against content discrimination also applies within the category of obscenity. Assuming this prediction is correct and that the Court finds a sufficient expressive component in obscenity to protect it from content discrimination, the next step in assessing the constitutionality of an anti-pornography ordinance under the logic of R.A.V. is to determine whether the ordinance is content-neutral or content-based. The test to determine whether legislation is content-neutral is whether it can be justified without reference to the content of the speech it seeks to regulate. n162 An anti-pornography ordinance fails this test, as it seeks to prohibit certain forms of expression based on the very message they proclaim; that is, the sexually explicit subordination of women. n163 If pornography proclaimed sexual equality, these ordinances would not be enacted.

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n162 See City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48 (1986).

n163 See Stone, supra note 102, at 467 (noting that anti-pornography legislation prohibits "not sexually explicit expression that might cause certain harms, but sexually explicit expression that portrays women, for example, as sexual objects who may enjoy pain, humiliation, or rape.").

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Supporters of pornography regulation would claim that anti-pornography ordinances are not content-discriminatory because they target harms wholly apart from the content of the speech. n164 Justice Stevens made a similar argument about hate speech in R.A.V. n165 It is not an answer to say that these regulations only target harms, and therefore are permissible. As the R.A.V. majority observed, this argument is mere wordplay, because the harms are a direct result of the viewpoint expressed in the speech. n166 The feelings of anger or fear caused by racial or ethnic slurs would not occur but for the content of the slurs. Likewise, the subordination of women or other effects of pornography would not occur but for the messages proclaimed by pornography. Even if anti-pornography legislation is drafted in harm-based terms, it would still be expressly directed toward the particular viewpoint that women are sexual objects who enjoy pain or humiliation. n167

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n164 See, e.g., Sunstein, supra note 95 at 617 ("[A]nti[-] pornography legislation should be regarded not as an effort to exclude a point of view, but instead as an effort to prevent harm.").

n165 See R.A.V. v. St. Paul, 112 S. Ct. 2538, 2570 (1992) (Stevens, J., concurring in the judgment).

n166 Id. at 2548.

n167 Stone, supra note 102, at 467.

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Even if an anti-pornography ordinance were found to be content-discriminatory, it would not necessarily be unconstitutional, but it would have to overcome a difficult burden to survive. Once a regulation of expression is determined to be content discriminatory, it is presumptively invalid and must survive strict scrutiny. n168 To pass this test, any regulation must be the least restrictive means necessary to advance a compelling governmental interest. n169

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n168 See, e.g., Simon & Shuster v. New York State Crime Victims Bd., 502 U.S. 105 (1991).

n169 See Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (content-based restrictions on speech are valid only if "necessary to serve a compelling state interest and [if] . . . narrowly drawn to achieve that end.").

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One interest often cited as justification for these ordinances is that they help protect women who are coerced into participating in the production of pornography. n170 This was a sufficient justification in New York v. Ferber n171 to support the regulation of pornography involving children. The district court in American Booksellers, however, observed that women do not need the same protection afforded children. n172 Unlike children, women are generally capable of protecting themselves from coercion. As a result, the district court in American Booksellers concluded that this interest was "not so compelling as to sacrifice the guarantees of the First Amendment." n173 In addition, the district court's response suggests that a woman's ability to protect herself indicates that these ordinances are not the least restrictive alternative. Rather, the legislation is both underinclusive and overinclusive. For example, women unfortunately face physical and social harms, such as violence and subordination, wholly apart from the production of pornography. An anti-pornography ordinance is therefore underinclusive because it only addresses one small cause of a large problem. Furthermore, and far more seriously, the ordinance is overinclusive because it regulates beyond what is necessary. For instance, the ordinance would make actionable some non-participating forms of pornography, such as pornographic books or illustrations. Moreover, not all women who participate in the production of pornography do so because they have been coerced. Thus, the fit between means and end would not be nearly tight enough to satisfy the rigors of strict scrutiny. n174

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n170 See Sunstein, supra note 95, at 595-97.

n171 458 U.S. 747 (1982).

n172 American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316, 1333 (S.D. Ind. 1984).

n173 Id. at 1334. Cf. Stone, supra note 102, at 472-73 ("Government has a compelling interest in preventing the coercion and exploitation of women who perform in pornographic works. . . . However, his is not a constitutionally sufficient justification for anti-pornography legislation.").

n174 Cf. Stone, supra note 102, at 473. As Professor Stone argues,

There is no good reason to protect only those women who perform in works that espouse the disfavored point of view . . . . Although some women may be coerced into performing in such works, there is no constitutionally sufficient basis to presume conclusively that all women who perform in such works are coerced and exploited.

This point was also emphasized in American Booksellers. See American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) ("These concerns have nothing to do with written materials subject to the statute, and physical injury can occur with or without the 'subordination' of women.").

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Moreover, less restrictive means are available to address this particular harm. For instance, criminal laws exist to deter aggressors who would harm women in the course of producing pornographic materials, and existing tort laws provide remedies to women who are harmed. n175 One author suggests that these alternative remedies render anti-pornography legislation a "superfluous solution to the problem of coercion." n176

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n175 Id. In a tort action, the victim can receive as restitution all consequential damages from her injury, including future profits from the pornographic materials. See id.

n176 Branit, supra note 1, at 450.

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A second possible justification for anti-pornography legislation is the government's interest in protecting individual women from certain harms (such as assault or rape) that are thought to be caused by exposure to pornography. n177 Protecting citizens from assaults and harassment is a very important state function. Therefore, it might be argued that this is a compelling governmental interest. Again, however, existing criminal and tort law make anti-pornography ordinances something other than the least restrictive means. It is also disputed whether a causal connection (as opposed to a mere correlation) between pornography and violence even can be proven. n178 Absent a demonstrable or significant causal relationship, a court would be less likely to conclude that an anti-pornography ordinance is the least restrictive means available to prevent the subject harm.

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n177 See, e.g., Sunstein, supra note 95, at 597-601.

n178 See, e.g., Branit, supra note 1, at 457.

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A third justification offered for anti-pornography legislation is that the state has a compelling interest in eliminating the "social subordination of women as a class." n179 This is the most amorphous of the justifications for regulating pornography. According to this argument, pornography promotes degrading or demeaning attitudes toward women and acts as a conditioning factor that encourages people to accept the unequal treatment of the sexes. n180 In American Booksellers, however, the district court [*129] dismissed the argument that this is a compelling interest. n181 Were this argument successful, there would seemingly be no limit to a legislative body's ability to discover and regulate other "compelling" interests, such as the prevention of racial discrimination, where the speech is clearly protected by the First Amendment. n182

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n179 Stone, supra note 102, at 472.

n180 See, e.g., Sunstein, supra note 97, at 25; MacKinnon, supra note 3, at 27.

n181 American Booksellers, Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316, 1335-36 (S.D. Ind. 1984).

n182 Id.

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The argument that pornography should be regulated in order to counter the social subordination of women is overreaching. Racist speech perpetuates the supposed inferior status of minorities, yet it receives constitutional protection. It is critical to differentiate between actual harm and speech advocating this harm. While the state's interest in preventing the actual harms caused by discrimination is compelling, the same cannot be said for the state's interest in regulating the speech advocating such discrimination (which is, in effect, what pornography is). n183 To accept this argument as a justification for proscribing pornography would be to justify the regulation of any expression that espouses an unconventional or unpopular idea.

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n183 See Stone, supra note 102, at 473-74.

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Finally, there are a number of less restrictive means available to combat the social harms that women suffer as a result of pornography. A local government may choose to mount some sort of publicity campaign to promote sexual equality, and to denounce sexual violence against women. Likewise, a legislative body might choose to enact or strengthen anti-discrimination and sexual harassment laws, which are regulations of conduct, not speech. There are certainly ways that pornography's message could be countered short of eliminating

disagreeable speech. n184

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n184 See also Thomas I. Emerson, Pornography and the First Amendment: A Reply to Professor MacKinnon, 3 YALE LAW & POL'Y Rev., 130, 142 (1984) (suggesting that more free speech, not the suppression of speech, would be a better way to address pornography and its message).

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As a final matter, the exceptions offered by the Court in R.A.V. probably would not save an anti-pornography ordinance from constitutional infirmity. Certainly, the message of some pornography is more offensive to community standards of decency than "typical" obscenity. Perhaps, therefore, an argument under the first R.A.V. exception could be made that this is a regulation of a subclass of unprotected speech for the same reason the larger category is regulable. n185 However, this would not support the regulation of all pornography under the ordinance. More fundamentally, as advocates of pornography regulation concede, the harms caused by pornography are simply not the same as the harms caused by obscenity. n186 Thus, the first exception offered by R.A.V. probably would not save anti-pornography legislation. The second exception would probably not be of much use, either, because it is difficult to argue that the ordinance targets any secondary effects of pornography that could be justified without reference to the content of the speech.

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n185 See R.A.V. v. St. Paul, 112 S. Ct. 2538, 2546 (1992).

n186 Note, supra note 98, at 466-67.

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VII. Policy Implications

As the law stands today, an anti-pornography ordinance, even if it is limited to materials that are also obscene, would probably be found unconstitutional as content discriminatory under the rationale of R.A.V. If this prediction is correct, it would be unwise for a city to try to regulate pornography through the typical type of legislation (such as that enacted by Indianapolis). Rather, it would be more advisable to attack directly, through content-neutral means, the harms pornography is thought to cause without silencing speech in the process.

Because it affords some protection to the lowest form of expression, the prohibition against content discrimination suggested by R.A.V. might seem counterintuitive. Consider, however, a statute granting a cause of action for libel only to Republicans, or a statute that criminalizes the incitement to riot only when the defendant's agenda is to bring down the incumbent president's trade policies. Such laws would certainly never be enacted because they would be seen as impairing democratic debate, even though the laws would only regulate unprotected speech.

Of course, as suggested by R.A.V. in the fighting words context, n187 a city might ban the entire category of obscenity, up to the constitutional limits set by Miller, n188 instead of regulating only obscene pornography. This would sweep in a great deal of pornography, although certainly much would be missed. As a matter of policy, though, it is less objectionable to attack the problems caused by pornography through means other than the regulation of speech. Promoting tolerance and respect is unquestionably a noble, and even a necessary, goal. It would require a radical departure from First Amendment jurisprudence, however, to argue that these goals justify the regulation of disagreeable speech. In short, the cure may well be more dangerous than the disease.

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n187 R.A.V., 112 S. Ct. at 2550.

n188 See Miller v. California, 413 U.S. 15 (1973).

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If pornography is to be regulated, the direction should come through a First Amendment categorical exception carefully drafted by the Court, and not from a legislative body choosing a particular viewpoint to suppress. Certainly an argument could be made that pornography is "low value" speech deserving of separate categorical treatment. This would be the wiser approach to addressing the harms of pornography.

These comments on the likely constitutional infirmity of an anti-pornography ordinance should not be read as a criticism of the goals of the legislation, but as a questioning of the means the drafters seek to employ. These same goals may be advanced, at least to some degree, by content-neutral means that rightfully [*130] condemn the hateful message of pornography without compromising the integrity of the First Amendment.

LEVEL 1 - 54 OF 96 ITEMS

Winter, 1998

16 Law & Ineq. J. 97

LENGTH: 30122 words

ARTICLE: As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society

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SUMMARY:
... Mortimer Adler asserts that the amount of liberty or equality permitted be as much as justice requires. ... Within this liberty narrative exists a rich but incoherent array of values that scholars often invoke to support an expansive notion of free speech. ... Rather than view the case as one that posed the equality interest in participatory access to one's community against another individual's interest in free expression, the Court treated the case as one involving solely issues of free speech and censorship. ... The marketplace of ideas cannot self-regulate so long as objections to lack of participatory access are subsumed by claims that the liberty interest in expression is primary to the equality interest in participatory access. ... Professor Fish similarly observes that when journalists reflexively complain that hate speech regulations may have a potentially "chilling effect," they focus on the right of expression to the detriment of other rights. ... Instead of displacing the great, liberal normative values of empathy/respect, autonomy/connectedness, participation/membership, human dignity/justice and liberty/equality, we should work to intertwine them in such a way that these values are hollow for no one. ... The Court determined that although the hate speech law limited Mr. Keegstra's right to free expression, it was a justifiable delimitation in a free and democratic society. ...

TEXT:
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What should experience be but a future implicated in a present!

- John Dewey n1

[Humanity's] capacity for justice makes democracy possible; but [humanity's] inclination to injustice makes democracy necessary.

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n1. John Dewey, The Need For a Recovery of Philosophy, in On Experience, Nature, and Freedom 27 (Richard Bernstein ed., 1960).

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- Reinhold Neibuhr n2

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n2. Reinhold Neibuhr, The Children of Light and the Children of Darkness: A Vindication of Democracy and a Critique of Its Traditional Defense xi (1944).

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Introduction

This Article will argue that liberty, free speech and equality are not separate independent norms. Instead, they are related and must be evaluated based on the requirements of justice. n3 Mortimer Adler asserts that the amount of liberty or equality permitted be as much as justice requires. n4 Just as there is no one concept of justice, I will also argue that our conception of the self is anemic and needs to be enriched. Much of our thinking about law, liberty and equality is based on an enlightenment view of a unitary stable self that is not plausible. I will suggest that the self is multiple, [*98] fractured and interdependent, and that this has important implications for how we should think about speech and equality as part of a democratic project. Our approach to the self in general and racial categories in particular may be reconceptualized. This reconception has important implications for law. I will also assert that popular slogans such as "more speech" as a remedy for injurious speech are counter-factual and normatively wrong. My goal in this Article is to sketch a normative and pragmatic view of free speech and equality that is grounded in participatory democracy as justice and a more realistic view of the self.

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n3. This is similar to John Rawls' argument asserting that liberty and equality are contextualized in the norm of "justice as fairness." See John Rawls, A Theory of Justice 13 (1973). While one might argue for different notions of justice, the notion precedes the question of the appropriate amounts of liberty and equality afforded to individuals by society. See Michael Walzer, Spheres of Justice 31-32 (1983).

n4. See Mortimer J. Adler, We Hold These Truths: Understanding the Ideas and Ideals of the Constitution 97 (1987).

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Like a richer view of the self, racial categories are not static, natural or coherent. Race is a social construct, and powerful social forces operate to render racial classifications opaque. Language materializes racial constructions. Epithets and similar linguistic constructions seriously harm minority members of society, individually and collectively, because of what such constructions suggest about the described individual's place within our social

fabric. Yet when society debates the issue of how to regulate hate speech, the focus is primarily on the infringement of liberty interests. Unfortunately, we often overlook or misunderstand abuses of free speech, such as the tendency of free-speech advocates to portray their opinions in a way that precludes others' ideas. n5 Most Americans, including scholars and judges, take it as self-evident that we are free to "speak our minds." n6 Yet as Professor Fish observes, "restriction, in the form of an underlying articulation of the world that necessarily (if silently) negates alternatively possible articulations, is constitutive of expression. Without ... an inbuilt sense of what it would be meaningless ... or wrong to say, there could be no assertion and no reason for asserting it." n7 Nonetheless, the assertion that free speech in fact is not "free," and should not be free, involves for many a degree of cognitive dissonance. n8

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n5. See Stanley Fish, There's No Such Thing as Free Speech (and It's a Good Thing, Too) 102 (1994) [hereinafter Fish, Speech]. "" Free speech' is just the name we give to verbal behavior that serves the substantive agendas we wish to advance; and we give our preferred verbal behaviors that name when we can ... because in the rhetoric of American life, the label "free speech' is the one you want your favorites to wear." Id.

n6. See john a. powell, Worlds Apart: Reconciling Freedom of Speech and Equality, 85 Ky. L.J. 9, 11 (1996) [hereinafter powell, Worlds Apart] (offering anecdotal evidence of this perception).

n7. Fish, Speech, supra note 5, at 103.

n8. In one sense, there is nothing terribly provocative about the notion that free speech isn't "free." This fact has always been recognized to some extent, as evidenced by the famous dissents of Holmes and Brandeis in Gitlow v. New York, 268 U.S. 652 (1925). In Gitlow, Holmes eloquently states that "every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it ...." Id. at 673. Holmes goes so far as to suggest that if the price of free speech to a free society is the overthrow of that society, that price must be paid. See id.

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This discomfort occurs precisely because our tradition purports to embrace unconstrained expression. n9 First Amendment discourse traditionally forms part of the larger, more general narrative of liberty. Within this liberty narrative exists a rich but incoherent array of values that scholars often invoke to support an expansive notion of free speech. n10 Free expression occupies a privileged position in our democratic society because many feel that any suppression would stifle the liberty and autonomy interests of the speaker, listeners and society in general.

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n9. See Fish, Speech, supra note 5, at 115 ("Absent some already-in-place and (for the time being) unquestioned ideological vision, the act of speaking would make no sense, because it would not be resonating against any background

understanding of the possible courses of physical or verbal actions and their possible consequences.").

n10. See Adler, supra note 4, at 140-44; Lee C. Bollinger, The Tolerant Society 57 (1986) [hereinafter Bollinger, Tolerant Society]; Lee C. Bollinger, The Tolerant Society: A Response to Critics, 90 Colum. L. Rev. 979, 979-80 (1990) [hereinafter Bollinger, Response]. The genealogy of liberty's privileged position can be found most apparently in Lockean and Enlightenment notions of individualism, although Calvinist Protestantism, incipient consumer capitalism, and even the claims of republicanism contributed to what became by the mid-nineteenth century a rights mentality. See Kenneth L. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. Rev. 303, 365-67 (1986). Tyrannies are perceived to share the essential attribute of evil, but the value emphasized in response to this evil is a function of zeitgeist, rather than an absolute antidote. Thus, although liberty was the value emphasized by the founders as the antidote to the evil of tyranny, see Adler, supra note 4, at 140-44, there is a consanguine, if not wholly overlapping, genealogy with respect to the role of liberty in vitiating specific tyrannies. See Kenneth L. Karst, Equality and Community: Lessons from the Civil Rights Era, 56 Notre Dame Law. 183, 183-99 (1980).

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In recent years, courts and scholars have begun to question to what extent and under what conditions speech actually promotes individual autonomy, n11 checks censorship n12 or ensures the attainment of truth and knowledge n13 in an uninhibited marketplace of [*100] ideas. n14 To promote these values, orthodox proponents of free speech argue that suppression of expression cannot be justified unless the speech falls within a recognized category of harmful speech. n15 Therefore, orthodox free speech advocates refuse to ex- [*101] amine harms from speech falling outside of the recognized categories.

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n11. See Rosenbloom v. Metromedia, 403 U.S. 29, 41 (1971) (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)) ("Freedom of discussion ... must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

n12. See Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Res. J. 521 (discussing the First Amendment as a check on governmental abuse of power through restriction of critical expression).

n13. See United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1941) (Hand, J.) (The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."); Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 878-79 (1963). The attempt to develop a comprehensive theory of the First Amendment encompasses many years and many commentators. Professor Emerson, a noted proponent of free speech, nonetheless admits that the effort has not been adequate. See id. at 878-87. His own effort, in turn, continues to be criticized as inadequate. See, e.g., C. Edwin Baker, Human Liberty and Freedom of Speech 47-50 (1989) (discussing Emerson's second and fourth values, the advancement of knowledge and the achievement of an

adaptable and stable community); Bollinger, Tolerant Society, supra note 10, at 43-103 (discussing the classical model of free speech); Owen Fiss, Liberalism Divided: Freedom of Speech and the Many Uses of State Power (1996) (characterizing the free speech controversy as not only a conflict between liberty and equality, but also a conflict between liberty of individual expression and liberty of access to public debate).

n14. See, e.g., Bollinger, Tolerant Society, supra note 10, at 18 (noting that society views free speech based on the "marketplace of ideas" principle); Richard Delgado & Jean Stefancic, Must We Defend Nazis pt. I (1997) (providing a chapter each on hate speech and pornography and legal responses to the issue of harm); Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law (1987); The Price We Pay (Laura J. Lederer & Richard Delgado eds., 1995). Each of these works posits that, to a greater or lesser extent, much of the expression protected under the First Amendment cannot be brought under the shelter of conventional justifications, such as truth seeking. Each also suggests that the cost of responding to expression which is harmful often remains an unexamined aspect of justification; that is, the cost to liberty is presumed to be too high, but this is never discussed. See Bollinger, Response, supra note 10, at 981-82.

Commentators and courts increasingly recognize that speech can be, and often is, not just offensive but harmful. Hateful forms of expression, such as racist aspersion and pornographic imagery, can inflict concrete injuries that do not fall readily into traditional speech justifying frameworks. For a discussion of psychological harm in the context of hate-speech and pornography see Gordon Allport, The Nature of Prejudice (1954) (also noting that racism harms the perpetrator by inhibiting mental development); Delgado & Stefancic, supra, at pt. I; James V. P. Check, The Effects of Violent Pornography, Nonviolent Dehumanizing Pornography, and Erotica: Some Legal Implications from a Canadian Perspective, in Pornography: Women, Violence & Civil Liberties 351-54 (Catherine Itzin ed., 1992) (noting the legal issues of obscenity); Cass R. Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 589, 591 (arguing that "pornography is "low-value' speech, entitled to less protection from government control than most forms of speech ... [and] can be regulated consistently with the first amendment").

Although the harm stemming from speech acts often suggests notions such as intentional infliction of emotional distress, and other tort-style injuries, inhibition of the opportunity to participate fully in one's community is perhaps the greater harm. See Richard Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling, 17 Harv. C.R.-C.L. Rev. 133, 143 (1982). It is commonly noted that harm is difficult to quantify. However, this is true throughout tort law, as for example, in wrongful-death cases. The mere fact that speech can inhibit participation suggests that it is a democratic harm and thus partially undermines utilitarian arguments. See generally Bollinger, Response, supra note 10, at 981 (discussing the sources of law's frequent inadequacy in dealing with future harm); powell, Worlds Apart, supra note 6, at 56-66 (discussing responses to utilitarian justifications for free speech)

n15. See Kent Greenawalt, Speech, Crime and the Uses of Language 143-48 (1989) (providing a list of free speech exceptions).

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This approach is exemplified by the Supreme Court's decision in R.A.V. v. City of St. Paul. n16 This case examined the constitutionality of a city ordinance which allowed the prosecution of an individual who burned a cross on the front yard of an African-American family. n17 The Court determined that the city ordinance proscribing speech that insulted, injured or provoked violence on the basis of race, color, creed, religion or gender was unconstitutional because its prohibition discriminated against disfavored subjects. n18 Rather than view the case as one that posed the equality interest in participatory access to one's community against another individual's interest in free expression, the Court treated the case as one involving solely issues of free speech and censorship. n19 The Court's one-sided treatment of conflicting values highlights the failure of the dominant narrative to encompass any argument asserting that expression not only serves to cultivate personal autonomy, but can also undermine it. At the same time, R.A.V. vividly illustrated that very little falls within the doctrinal category of "harmful speech that can be regulated." n20 Justice Scalia, while repeating a litany of categories that had been said to exist outside "the area of constitutionally protected speech," n21 nonetheless observed that no category of speech "is entirely invisible to the Constitution." n22 In other words, R.A.V. epitomizes the dominant narrative insofar as it privileges the act of expression over any other consideration, even when other constitutional norms are at issue.

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n16. 505 U.S. 377 (1992).

n17. For an extended treatment of the facts of the case, see Charles R. Lawrence III, Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment, 37 Vill. L. Rev. 787 (1992).

n18. See R.A.V., 505 U.S. at 378.

n19. See id. (lacking any discussion of equality or participation).

n20. Id. at 382-83 (discussing categories of harmful speech).

n21. Id. at 383 (quoting Roth v. United States, 354 U.S. 476, 483 (1957) (referring to obscenity)).

n22. Id.

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While the exalted status of the First Amendment among liberal values is understandable, n23 history teaches that no one value [*102] supporting democratic society remains static, either in importance or in application. n24 The reverence the First Amendment has traditionally been accorded as a means of vitiating multiple tyrannies should not mean that classic doctrinal formulations are sacrosanct. n25 This Article suggests that a democratically valid judicial decision must clearly enunciate a conception of justice informed by an awareness of the multiple values within our society and the multiple identities within ourselves. n26 Reformulation of identity in [*103] light of the insights proffered by critical race and post-modern theorists suggests that the classic remedy for harmful speech - that is, more speech - will, in some instances, perpetuate disparities of power and destabilize our sense of self. The

marketplace of ideas cannot self-regulate so long as objections to lack of participatory access are subsumed by claims that the liberty interest in expression is primary to the equality interest in participatory access. A self-regulating marketplace presupposes an equal starting line - an assumption that has never been a reality in American political life. n27

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n23. See Adler, supra note 4, at 140 (observing that our deeply ingrained appreciation of liberty values in the American tradition stems from overthrow of tyranny, and that the founding fathers were "first and last, proponents of liberty, with either no thought about an equality of conditions for all or, worse, with obstinate prejudices against it."); Bernard Bailyn, The Ideological Origins of the American Revolution 25-43 (1967) (contending that the founders were primarily concerned with the threat of corrupt and arbitrary uses of power, and by extension, with accountability and legitimacy in the exercise of political authority); Blasi, supra note 12, at 528-38 (explaining the importance of free expression because it checks the abuse of power); cf. Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1146 (1991) (suggesting that the First Amendment was not intended to be "first" in a foundational sense, but rather worked in concert with two other proposed amendments to provide a structural barrier against pursuit of self-interested agendas).

n24. The history of equal protection law provides an obvious example of a change in the degree of valuation over time. At the time of Plessy v. Ferguson, 163 U.S. 537 (1896), the Court was unable or unwilling to see that the stigma of alienating treatment undermined the value of equality. By the time of Brown v. Board of Education, 347 U.S. 483 (1954), the Court was able to recognize that the psychic harm of segregation undermined Black students' sense of equality. As Professor Schauer notes, arguments for limiting free speech during the middle part of this century were primarily based on concern for conflict of the right to expression with accepted values such as national security and public order. See Frederick Schauer, Must Speech Be Special?, 78 Nw. U. L. Rev. 1284, 1285 (1983). Changes in First Amendment doctrine can largely be attributed to changes in the relative values accorded to these competing interests over time.

n25. The purpose of this Article is not to weigh in favor of either free speech or equality at the expense of the other, but to suggest that the inclination to privilege absolutely one set of values, principles, and metaphors over the other is too often a function of misunderstanding and myopia infused with power. This problem can be described as one of "rational prejudgment," a concept which suggests that legal judgment is largely if not wholly indeterminate. See Richard Posner, The Problems of Jurisprudence 124-25 (1990) (observing that conflict of interest recusals and divisive appointment politics support the common-sense notion that judges analyze fact patterns from their own, usually unconscious, narrative framework). It is only when narratives are largely coterminous that legal decision-making takes on the trappings of neutrality and inevitability, and the appearance of an autonomous discipline capable of applying valid rules to reach determinate results. See id. at 430-33 (discussing the legacy and demise of the Legal Process school).

n26. What is already clear is that recourse to justice cannot be grounded on an objective and transcendental claim. This Article follows Professor Torres in applying to legal analysis the insight that there is not justice, rather there

are justices. See Gerald Torres, Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice - Some Observations and Questions of an Emerging Phenomenon, 75 Minn. L. Rev. 993, 994 (1991). The divergent conceptions of justice can be viewed as strategies to achieve particular results, to either transform or perpetuate racist society. Professor Fish notes that the absence of neutrality compels the conclusion that First Amendment doctrine is purely a matter of politics, and that is why George Bush could support a constitutional amendment prohibiting desecration of the flag while at the same time opposing hate speech regulation. See Fish, Speech, supra note 5, at 110. However, justice represents more than just strategy. We also resort to the concept on the basis of a belief that consulting a collective sense of justice substantiates and legitimizes a particular result. See generally john a. powell, The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity, 81 Minn. L. Rev. 1481 (1997) [hereinafter powell, Multiple Self] ("There was a concurrent need to construct an ideology to justify certain practices, such as slavery and colonialism, which clearly violated norms emanating from an equal and essential self ... yet the very manner in which modernists defined the self justified those practices.").

n27. As Cass Sunstein points out, the First Amendment currently languishes in a sort of pre-New Deal torpor, in which existing distributions of power are considered inviolable. See Cass R. Sunstein, Free Speech Now, 59 U. Chi. L. Rev. 255, 264 (1992) (noting the applicability to the First Amendment of President Roosevelt's reference to ""this man-made world of ours' and his insistence that "we must lay hold of the fact that economic laws are not made by nature. They are made by human beings'").

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Although much has been written on the topic of the harmful aspects of speech, too little attention has been given to the ways that racial identity informs and constrains society's ability to engage in productive dialogue. This impediment in turn undermines the efficacy of more speech as an antidote to expression that harms the participation interests of marginalized members of society as well as distort the participation of the majority. This Article attempts to identify some of the psychological and social constructions that hamper efforts to mediate between the reality and the formalism of First Amendment jurisprudence. Part I briefly describes the traditional narrative of the First Amendment, focusing on the argument that more speech serves as a panacea for any injury stemming from harmful expression. In addition, Part I examines the psychological concepts of participatory empathy and multiplicity and suggests that these concepts undermine a basic assumption of the "more speech" remedy - that all members of society have the ability to participate meaningfully in democratic institutions. Part II develops links between philosophical pragmatism and theories of justification and participatory access, emphasizing the implications of pragmatic insight into the profound constructedness of our institutions. Part III cautions that the values that are at stake when we talk about regulating hate [*104] speech may be preserved through an adoption of a democratically pragmatic conception of participatory justice. This Article concludes by examining Keegstra v. Regina, n28 a Canadian Supreme Court case that serves as an example of how lucid reasoning concerning the fundamental interest in participatory access is capable of balancing the values of both liberty and equality.

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n28. [1991] 2 W.W.R. 1.

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This Article also concludes that in recognizing participation as a value superior to any significant experience of or aspiration to liberty or equality, authentic democratic foundations presuppose that all actors share a common narrative grounding. Recourse to the regulative ideals of democracy will not, of course, prove to be a panacea. Rather, by recognizing the plasticity and multiplicity embedded in a mature democratic vision, we can identify and work toward resolving unnecessarily pronounced tensions. Contextualized discussions of opposing narratives demonstrate that in many ways the referents are the same - the demand for equal liberty is also a demand for democratic equality.

I.

Many Voices - One First Amendment

A.

More Speech: The Traditional First Amendment Narrative

Free speech exists generally to promote personal and political autonomy, but scholars offer differing formulations of which specific values are significant. n29 Professor Emerson, for instance, has identified four principle values: "(1) individual self-fulfillment and self-realization, (2) truth finding, (3) participation in decision-making, and (4) balance between stability and change." n30 This framework has led to increasingly nuanced formulations, n31 but has proved incapable of providing a workable explanation about whether [*105] each value is equally important, and how to resolve inevitable tensions resulting from situations in which these values conflict. n32

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n29. See, e.g., Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People (1960) (asserting that freedom of speech guarantees religious beliefs and ownership of property); Emerson, supra note 13, at 878-79 (examining the function of free speech in a democratic society); Kent Greenawalt, Free Speech Justifications, 89 Colum. L. Rev. 119 (1989) (setting out justifications for free speech).

n30. .For a more complete discussion of the various criticisms and reformulations of Emerson's values, see powell, Worlds Apart, supra note 6, at 44-48. This Article focuses on how the value of participation may be inhibited or promoted by speech. When Professor Emerson discusses participation, he refers exclusively to the formal notion that as long as there are no overt constraints on participation, the autonomy, or liberty, interest in being permitted to participate in the laws one must adhere to is met. See id. at nn.150-51.

n31. See Baker, supra note 13, at 47.

n32. Some commentators believe that the essence of free speech is the liberty right of the speaker. See id. at 47-51. Others suppose that the essence of free speech is its social and political force. See Bollinger, Tolerant Society, supra note 10, at 46. It is clear that limitations on speech affect the autonomy of the speaker and that certain speech acts can compromise the rights of the listener. Few commentators believe that this tension can ultimately be resolved. See Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 Wm. & Mary L. Rev. 267, 289 (1991); see generally Bollinger, Tolerant Society, supra note 10 (discussing the insufficiency of rationales proffered in support of the First Amendment).

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In this traditional narrative, any limitation on the freedom of the speaker threatens her autonomy and self-development. While it is apparent that privileging the value of unrestrained expression will conflict with the value of participation, particularly in the sense that this choice will compromise the ability of disempowered groups to constitute themselves socially, society views the right to say whatever one chooses as primary. n33 The traditional claim is that free expression is privileged not only because it is necessary to the pursuit of truth and self-development, but also because free expression does not cause "real or substantial harm." n34 Even among those commentators who recognize that hateful speech can cause substantial harm, the value of expression in promoting autonomy and individual development invariably trumps the desire to limit speech. n35 Of course, it is impossible to ignore the paradox that a right designed to foster autonomy can have the effect of undermining others' autonomy. n36 Nonetheless, theorists attempt to finesse this point by adopting the position that only a narrow category of "coercive" speech warrants restriction. n37

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n33. See Post, supra note 32, at 273.

n34. powell, Worlds Apart, supra note 6, at 58. Of course, the law of libel provides an obvious example of exceptions to the assertion that speech does not cause real harm. See id. at 58-59. Nonetheless, commentators often trivialize the harm that racist speech causes by claiming that it is only an insult or a harm to civility. See id. at 60.

n35. See Baker, supra note 13, at 50 (arguing that the foundational status of autonomy and individual liberty militates against utilitarian balancing of First Amendment rights).

n36. See Frank A. Michelman, Universities, Racist Speech and Democracy in America: An Essay for the ACLU, 27 Harv. C.R.-C.L. L. Rev. 339, 353 (1992) (noting that racist speech impairs communicative autonomy as well as participatory access to democratic institutions).

n37. See Baker, supra note 13, at 56. For a more extended discussion of this argument, see powell, Worlds Apart, supra note 6, at 62-64.

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The classic formulation of the "marketplace of ideas" appears in Justice Holmes' dissent in Abrams v. United States. n38 The mar- [*106] ketplace of ideas is premised on the belief that the non-intervention of the state is the best guarantor of identifying truth and falsehood. n39 This premise has been challenged on several grounds. John Stuart Mill believed that there was a causal link between freedom of speech and attainment of knowledge. n40 The view that truth is self-evident, needing only expression to be recognized, however, assumes the existence of an objective truth that is identifiable. n41 It also assumes that the public will eventually identify what is true within a "marketplace of ideas." n42 If either of these assumptions is flawed in some way, as Professor Schauer observes, the proper response is an empirical inquiry into whether an open market does in fact maximize the attainment of truth. n43 One might ask why the same insights that law applies to economic markets - that disparities of power based on race, class, and gender discrimination are reproduced in an open market - should not also be applied to speech. n44

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n38. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("The best test of truth is the power of the thought to get itself accepted in the competition of the market").

n39. See generally Karl R. Popper, The Open Society and Its Enemies (5th ed. rev. 1966) (chronicling a history of attacks upon free discourse).

n40. See John Stuart Mill, Of the Liberty of Thought and Discussion, in On Liberty 15, 33-52 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859).

n41. See generally Frederick Schauer, Free Speech: A Philosophical Enquiry 19-29 (1982) (discussing the relation of knowledge to open expression).

n42. See id. at 16. "Freedom of speech can be likened to the process of cross-examination. As we use cross-examination to test the truth of direct evidence in a court of law, so should we allow (and encourage) freedom to criticize in order to test and evaluate accepted facts and received opinion." Id.

n43. See id.

n44. See generally Fiss, supra note 13, at 12-17 (noting that media centralization skews the politics of scarcity); Sunstein, supra note 27, at 261 (arguing for a "New Deal" for speech).

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In addition one may ask whether the basic assumptions of the marketplace of ideas might not also be faulty on psychological grounds, and if so, what might be the appropriate response within a pluralistic democratic framework. The ongoing debate regarding the permissibility of proscribing hateful speech to vindicate equality interests invites us to explore these issues.

The discourse about the relationship between free speech and equality arose in reaction to both psychological research confirming the dangers of

pornography and a rash of incidents, including cross-burnings, racist graffiti in dormitories and residential areas, and physical attacks. n45 The corresponding promulgation of hate-speech regulation continues to occasion incisive law review articles [*107] and books, n46 but has produced little genuine dialogue. Instead, much of what passes for discourse may be better described as parallel debates or serial monologues. n47

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n45. See Mari J. Matsuda et al., Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment 1-15 (1993).

n46. See, e.g., Fiss, supra note 13; Hate Speech and the Constitution: Volume 2: The Contemporary Debate: Reconciling Freedom of Expression and Equality of Citizenship (Steven J. Heyman ed., 1996) (collecting law review articles and other commentary on the topic).

n47. See powell, Worlds Apart, supra note 6, at 27 (noting that even the most thoughtful works attempting to reconcile the values of liberty and equality end up privileging one or the other).

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The debate is more complex than the predilection for absolutist solutions would suggest. This problem of complexity, however, is mostly one of perspective. That is, our narratives delimit our capacity for empathetic dialogue. n48 Unfortunately, we are usually unaware of the extent to which we operate within a particular conceptual framework or even that there are other, competing frameworks. This oversight impedes our ability to anticipate the response that a particular action will likely create in a person with a different perspective.

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n48. By "narratives" I do not mean to suggest that each of us has a story to tell, but that each of us is in fact our stories. As Oliver Sacks states,

We have, each of us, a life-story, an inner narrative - whose continuity, whose sense, is our lives. It might be said that each of us constructs and lives a "narrative', and that this narrative is us, our identities. If we wish to know about a [person], we ask "what is [that person's] story ....'

Oliver Sacks, The Man Who Mistook His Wife for a Hat and Other Clinical Tales 105 (1985). A significant implication of this view is that no language is merely descriptive. This has enormous ramifications for the study of law. See generally Kim Lane Scheppele, Foreword: Telling Stories, 87 Mich. L. Rev. 2073 (1989) (noting that "the experience of justice is intimately connected with one's perception of "fact,' just as it is connected with one's beliefs and values").

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Journalists offer an excellent example of the way our narratives construct and constrict our interests and responses. I often receive calls from reporters after racist incidents on college campuses. They are almost always interested in whether explicitly racist incitements might lead to the consideration of

policies to limit speech by the college. Very few are interested in the rise of explicit racism and the consequent threat to equal opportunity for minority groups on college campuses. To the extent that they recognize these issues, they see them as trumped by free speech concerns. n49 There is both a failure to seriously engage other perspectives and to see free speech as more than a unitary concept. There is an assumed harm associated with anything less than an absolutist view of speech and a trivialization of the serious harm that speech can and does cause. After speech is situated in a primary [*108] position, concern about racist hate speech and White domination through speech is seen as no more than a move to censor, or at least chill, speech. This happens without serious consideration of the chilling and more destructive effects of speech that maintain exclusion and racial dominance. Professor Fish similarly observes that when journalists reflexively complain that hate speech regulations may have a potentially "chilling effect," they focus on the right of expression to the detriment of other rights. n50 That is, they fail to consider how the chilling effect of hate speech impacts upon targeted minorities constitution of self or participation.

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n49. This point is developed more fully in powell, Worlds Apart, supra note 6, at 11-12.

n50. In recounting the story of a journalist writing for a university newspaper who complained that in the wake of hate speech regulation there would always be something in the back of his mind, Professor Fish comments that we respond by reminding him that there's always been something in the back of his mind, and his complaint merely begs the question of whether "it might be better to have this code ... than whatever was in there before." Fish, Speech, supra note 5, at 111-12.

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Of course, the world only makes sense because we have an orientation to it, and it is inimical to our social psychology not to identify with that perspective. n51 In ignoring or suppressing the subjectivity of our perspective, we fail to examine the multiple and various functions of speech that are at times in conflict with the values underlying freedom of speech. Problems occur when the lens through which we see the world destroys our ability to recognize that what is peripheral for us may be central or defining for others. Through this failure to notice and examine that which is outside the dominant perspective, the harm caused by the free speech regime is either undetected, or when detected, seen as negligible.

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n51. See Hans-Georg Gadamer, Philosophical Hermeneutics 3-8 (David E. Ling ed. & trans. Univ. of Cal. Press 1976).

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The self-absorbed focus exacerbates the perpetual nature of narrative structure. Divergent premises lead to ever more divergent solutions. Professor MacIntyre suggests that this problem of incommensurability makes many contemporary issues seem intractable:

We thus inhabit a culture in which an inability to arrive at agreed rationally justifiable conclusions on the nature of justice and practical rationality coexists with appeals by contending social groups to sets of rival and conflicting convictions unsupported by rational justification .... Disputed questions concerning justice and practical rationality are thus treated in the public realm, not as matter for rational enquiry, but rather for the assertion and counter-assertion of alternative and incompatible sets of premises. n52

[*109] The implications of this assessment are not as dire as they first appear. Professor MacIntyre does not mean that incommensurable narratives cannot be compared, but only that there is no neutral or natural vantage point from which to do this. n53 Rather, the challenge is to develop self-conscious heuristic devices which are capable of teasing out commonalities or, when necessary, fusing separate horizons. n54 Professor MacIntyre's observations undermine the objectivist argument for the marketplace of ideas. If there is no Archimedian point from which to compare assertions, then the various interpretive communities that constitute a democratic society ought to agree upon a framework in which to engage in dialogue. It seems obvious that the mere assertion of one narrative perspective, with no attendant concern for understanding competing world views, does little to promote social or political dialogue. Yet our free speech jurisprudence analyzes each individual act of expression independently, with little regard for how that expression fits into the complex web of social discourse. In a democratic system, which presupposes engaged citizens capable of discovering truth through debate and interaction, the marketplace of ideas might always serve the purpose of fostering political debate by providing a forum in which all participants have meaningful access. Denial of access in one situation or sphere may be less troubling if access were available in others. But many in our society are consistently denied meaningful access in a number of critical sites. This distorts the democratic process and our identities. Most free speech advocates do not even acknowledge this systemic problem, let alone offer remedies for it.

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n52. Alasdair MacIntyre, Whose Justice? Which Rationality? 5-6 (1988).

n53. See generally Richard Rorty, Contingency, Irony, and Solidarity (1989) (attempting to show that self-creation and human solidarity are equally valid, but incommensurable).

n54. See Richard A. Bernstein, Beyond Objectivism and Relativism 162-63 (1983).

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B.

Participatory Empathy as a Function of Democratic Values

When speech exacts an injury, the call for more speech rings hollow and is often clearly wrong. It also obscures the fact that much harmful speech is designed to hurt and to undermine the autonomy of the victim. A threatening phone call, a cross burned on the lawn of a Black family or a swastika placed on the home of

a Jewish family cannot be explained adequately in terms of the autonomy and expression rights of the speakers. Nor do remedies for property damage capture the harm to the recipient. Where [*110] speech takes place in a larger community and causes offense, it might be more plausible to ameliorate the injurious effects with more speech, but only if certain conditions prevail.

For example, in R.A.V., the cross-burner presumably intended to impress upon the Jones family that the Jones were not welcome in the community. That other community members do not share that sentiment does little to detract from the powerful alienating force of the statement. While the members of the Jones family may in fact have formal access to their community, perhaps through a letter in their community newspaper, they may presume correctly that such a response does little to engage the cross-burners in a dialogue. The cross burners have already conveyed the fact that they do not care to hear what the Jones family has to say.

The unfortunate reality is that the "more speech" remedy is ineffectual where one party to an exchange lacks the capacity for empathetic and respectful dialogue and the other lacks the power to mandate engagement. Where parties to an exchange share little in the way of overlapping narratives, assertions and counter-assertions are likely to remain parallel, passing each other without ever engaging the intended listener. This does not mean that members of a democratic society should not strive to gain an understanding of perspectives outside their own experience. Nonetheless, the current reality, ignored by the traditional First Amendment narrative, is that the marketplace of ideas is not only skewed, but by its nature incapable of neutrality. The marketplace of ideas excludes and thus reproduces disparities in power. Disparities in power lead to disparities in participatory access. It is clear that in many hate speech cases the purpose and the effect is to injure and exclude, not to find the truth or engage in mere self expression.

The marketplace of ideas metaphor became popular when society still believed in an objective truth. As this belief has been undermined, the apparent power of the metaphor is called into question. Some commentators have recognized this and have suggested a foundation based on a weaker claim of objective truth. Bollinger has argued for more speech based on a tolerance rationale instead of a truth rationale, and Baker has used liberty as his foundation. n55 I have suggested that the function and values related to speech are varied and multiple, which suggests that the [*111] foundation and justification for speech must also be varied and multiple. But because of the unstable and multiple nature of speech values and truth, I assert that participation in the democratic self-constitutive process is prior to liberty and tolerance in many sites.

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n55. See Bollinger, Tolerant Society, supra note 10, at 140-44; Baker, supra note 13, at 67-69.

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While the value of respect has received significant attention, n56 too little commentary exists discussing the uneasy relation between empathy and law. n57 As used in this Article, empathy refers to an experientially defined emotional response to the situation of another, the capacity to dance lightly

in another's reality. Empathy requires consideration and effort and thus presupposes an experiential component n58 insofar as it is evocative of a desire to transform n59 the necessarily limited bounds of one's experiential reality. n60 Genuine empathy is an active process, rather than a passive statement of principle. n61

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n56. See, e.g., Kenneth L. Karst, Belonging to America (1989) (discussing the ideals, perceptions and realities of equality in America).

n57. For a detailed discussion of empathy in the legal context, see Lynne N. Henderson, Legality and Empathy, 85 Mich. L. Rev. 1574 (1987), which attempts to reconcile empathy, understanding people's experiences through interpretation or intersubjectivity, with legality, or rule-based law.

n58. It is important to note that much, and likely the majority, of human experience is internal and consists of reflection and judgment. Too often we think of experience as simply a collection of sensations and external encounters.

n59. In employing the term "transform" in the textual sentence, rather than "transcend," I mean to emphasize that when change and insight occur, we are always already in another context. Drucilla Cornell similarly suggests that the boundary between "transcend" and "transform" can be located by reference to reciprocity. See Drucilla Cornell, Beyond Tragedy and Complacency, 81 Nw. U. L. Rev. 693, 697 (1987) [hereinafter Cornell, Beyond Tragedy]. See also Drucilla Cornell, Toward a Modern/Postmodern Reconstruction of Ethics, 133 U. Pa. L. Rev. 291, 295 n.15 (1985) [hereinafter Cornell, Ethics] (observing that Unger's philosophy, see supra notes 50-53 and accompanying text, fails to account for the necessity of validating one's world-view through dialogue with others).

n60. The extent to which one can hope to realize this desire is the subject of much debate. See, e.g., Cornell, Beyond Tragedy, supra note 59, at 697 (arguing against Roberto Unger's idea that "the individual's striving must culminate in the recognition of her own fundamental interconnectedness with others" - that is, in reciprocity); Lawrence Lessig, Plastics: Unger and Ackerman on Transformation, 98 Yale L.J. 1173 (1989) (exploring the meaning of the term "transformation" in critical race theories). Professor Kohlberg has utilized the concept of "reversibility," or "reciprocity of perspectives," as a tool to be employed in confronting competing perspectives. See Michael Rosenfeld, Affirmative Action and Justice 249 (1991). This concept requires that conflicts be resolved by "subjecting all the competing claims" to each perspective involved, in order to ensure "the claims that can be justified from all the relevant perspectives." Id. This theory requires the actors to place themselves imaginatively in the place of the other actor. Compare id. at 249-50 (quoting Lawrence Kohlberg, Justice as Reversibility, in Philosophy, Politics and Society 269 (Peter Laslett & James Fishkin eds., 1979)) (suggesting that the competing claims be reconciled through "moral musical chairs") with sources cited supra note 59 (questioning our ability to achieve transformation by recourse to imaginative displacement, without more). Professor Rosenfeld notes that the ambiguities implicit in the concept of reversibility suggest a distinction between different perspectives and different worlds. See Rosenfeld, supra, at 250.

n61. Reliance on empathy must avoid the danger of idealizing language, thereby deepening the gulf between rhetoric and action. See powell, Worlds Apart, supra note 6, at 11 n.3. Instead, a participatory system should understand empathy to be a pragmatic, experiential avenue for weakening the centripetal forces of an insular narrative structure. The regulative pull of genuine dialogue can thus serve as a catalyst for breaking out of our little worlds.

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The conception of empathy as experiential conflicts with Professor Delgado's critique of empathy. n62 Delgado discusses the prevalent notion of empathy as a means by which marginalized peoples can identify with each other, and dominant cultures can identify with those who are marginalized. This concept, he suggests, is counter-productive. n63 Singled out for special censure in this critique are public interest lawyers. n64 According to the pro- [*113] tagonist in Delgado's book, "to be both a lawyer and an empathetic human is practically an impossibility." n65 The protagonist believes that people think they are more empathetic than they really are. n66 The character states that "a sentimental, breast-beating kind [of empathy] is common among White liberals." n67 This argument regarding empathy reverses the Gramscian notion of false consciousness, in which marginalized peoples adopt their oppressors' values and perspectives, thereby becoming complicit in their own oppression. n68 That is, White attorneys attempting to articulate the experience of their minority clients co-opt their clients' experiences and become complicit in their clients' oppression. This contrast between false consciousness and articulation of a client's story, while superficially attractive, seems to miss the mark. Delgado actually seems to be describing a semiconscious falseness masquerading as empathy. While Professor Delgado identifies a problem that should give us pause, it should not detract from the possibility of real empathy.

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n62. See Richard Delgado, The Coming Race War? 4-36 (1995) [hereinafter Delgado, Race War]. This critique is presented in a more developed form in Delgado & Stepahnic, supra note 14, at 115; Richard Delgado, Rodrigo's Eleventh Chronicle: Empathy and False Empathy, 84 Cal. L. Rev. 61 (1996). The term "empathetic fallacy," coined by Delgado and Stefancic, has its corollary in literary criticism. In their view, both the "pathetic fallacy," a critique of anthropomorphism in poetic imagery, and the empathetic fallacy similarly stem from hubris, the belief that through "speech and remonstrance we can surmount our limitations of time, place and culture, can transcend our own situatedness." Delgado & Stefancic, supra note 14, at 72. This definition locates the shortcomings of empathy in the linguistic and formative constraints on our ability to overcome our own interested narratives. However, empathy does not, as I try to develop below, require an idealization of language in order to effectuate shifts in consciousness. That is, while empathy does not insist on the possibility of transcending our selves, neither does it reject the possibility of being transformed through engaging in dialogue. Rather it recognizes that we are both constrained and redefined by the values we embrace and the conversations in which we engage. See Gadamer, supra note 51, at 59-69; Roberto Mangabeira Unger, Knowledge & Politics 111-13 (1975).

n63. See Delgado, Race War, supra note 62, at 10. Delgado's conviction that reliance on empathy is counterproductive may stem from acceptance of the less than sanguine vision of prospects for equality forwarded by Derrick Bell. See Derrick Bell, Racial Realism, 24 Conn. L. Rev. 363, 377-78 (1992) (arguing that a "realistic" assessment of current racial conditions brings about a release from despair). Cf. john a. powell, Racial Realism or Racial Despair?, 24 Conn. L. Rev. 533, 545-49 (1992) [hereinafter powell, Racial Realism] (arguing that a pragmatic and hopeful notion of equality is "self-evident" and transformative). Indicative of Delgado's orientation is his instructive metaphor of a computerized judicial system, used to suggest that people don't really want an empathetic society. See Delgado, Race War, supra note 62, at 9. Even if a computer could simulate judicial decision making, we wouldn't want it, because the machine would not permit preferential treatment. See id. at 10. That is, investment bankers and suburban teenagers wouldn't receive disproportionately lighter treatment by virtue of their status. See id. Society would rebel, demanding preferential treatment for the economically privileged. The metaphor is instructive, but has less to do with empathy than it does with the propensity to maintain and perpetuate privilege. See id.

n64. See id. at 25.

n65. Id. at 27.

n66. See id. at 18.

n67. Id. at 12.

n68. Gramsci actually used the term "juridical problem" to describe the coerced "adaptation" of the masses in accordance with the requirements of the goal to be achieved. According to Gramsci, the law of the State performed this function by creating an ostensibly neutral site of desirable homogeneity. See Antonio Gramsci, Selections from the Prison Notebooks, 195-97 (Quintin Hoare & Geoffrey Nowell Smith eds. and trans., 1971); see also Georg Lukacs, History and Class Consciousness (Rodney Livingstone trans., 1971) (interpreting and applying Karl Marx's methods as Marx understood them); Theodore W. Adorno, Introduction, in The Positivist Dispute in German Sociology 21-22 (Glyn Adey & David Frisby trans., 1969) (discussing false consciousness as it relates to true consciousness and objective truth). Milan Kundera describes a phenomenon similar to "false consciousness" with the phrase "the brilliant ally of one's own gravediggers." Milan Kundera, Immortality 118 (Peter Kussi trans., 1990). By this he intends to decry a cavalier acquiescence to post-modern pastiche, implicitly recognizing that empathy and relativism are two very different things.

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The reasons given for this gap between intentions and reality are twofold. First, the empathy claimed by clinicians is not genuine empathy, but rather "sentimental breast-beating" n69 resulting from cognitive and narrative theory barriers and from most White folks not possessing "double consciousness," defined as the ability to view the world from two perspectives simultaneously. n70 Second, there are institutional barriers: lawyers cannot tell their client's [*114] story other than in the desiccated, stylized form required by the system. n71

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n69. Delgado, Race War, supra note 62, at 12.

n70. Id. at 13 (citing W.E.B. DuBois, The Souls of Black Folks 16-17 (1903); Ralph Ellison, The Invisible Man 1-7 (1952)).

n71. Cf. Monroe H. Freedman, Atticus Finch: Right and Wrong, 45 Ala. L. Rev. 473 (1994) (offering a reassessment of Atticus Finch, the much heralded lawyer from Harper Lee's To Kill a Mockingbird, on several grounds, including that he failed to tell Tom Robinson's story largely because of unquestioning adherence to extant legal structures; nonetheless Finch is largely perceived as empathizing with his client).

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The first, cognitive, barrier aspect of this claim is predicated on "norm theory," a social-psychological hypothesis which holds that empathy varies in proportion to our perception of the "normalcy" of a situation. That is, the situation of starving Ethiopians appears "normal" to wealthy North Americans, but that of an upper-middle-class family losing their home seems "abnormal." Wealthy North-Americans' ability to identify with the distress of each party correlates with this perceived normalcy. n72 Thus, empathy dissipates in proportion to the extent to which inequalities are structurally ingrained and normalized.

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n72. See id. at 17; see also Ezra Stotland et. al., Empathy and Birth Order 124 (1971) (suggesting that we do in fact empathize more easily with people similar to ourselves).

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The second strain of the false empathy claim rests on institutional barriers. Here we stand on well-traveled ground. n73 As I suggested above, the journalist reflexively privileges the First Amendment precisely because the legal narrative resonates with her own. Similarly, the lawyer will be constrained by the narrative of legal storytelling because she was trained to represent her client's interests within the parameters of that institution. That the institution disallows the telling of a contextualized, coherent story is a cliche. The law can be viewed as a story and a fiction but because of its central role in our institutional structure is reified so that the fiction becomes opaque.

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n73. See generally Symposium, Legal Storytelling, 87 Mich. L. Rev. 2073 (1989).

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While Delgado's claims of the empathetic fallacy are insightful and instructive, he seems to be describing bathos n74 rather than empathy. In current usage, bathos has two primary meanings. The first is a strained or

insincere pathos (understood as an emotion of pity over suffering of oneself or another), which is what Delgado's character seems to describe when he attributes to public interest lawyers a solipsistic liberal empathy. In this scenario, the attorney rails against the injustices done to her client not out of a deeply felt sense of pathos, but rather because the attorney wants [*115] the audience to empathize with her hopeless cause. n75 This describes false depth, a common fault among those seeking to promote or attain a conception of justice to the exclusion of material reward. n76 Having dispensed with monetary gain, a particularly conspicuous and ubiquitous reward system, public interest attorneys may ascribe pure intentions to themselves for the purpose of self-aggrandizement. n77 This phenomenon also resonates with the definition of bathos as the unexpected appearance of the vulgar or base in otherwise elevated language. Although bathos is primarily a term of literary criticism, Delgado's empathetic fallacy describes an analogous situation with the appearance of less than admirable motives in an otherwise irreproachable moral stance. Delgado's critique is thus one of bathos and does not preclude reliance on empathy as a basis for fostering participation as a societal value.

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n74. The term "bathos' is derived from the Greek word for depth. See Webster's II New College Dictionary 94 (1995).

n75. See Delgado, Race War, supra note 62, at 28.

n76. See id. at 27-28.

n77. See, e.g., Soren Kierkegaard, Purity of the Heart Is to Will One Thing (Douglas V. Steere trans., 1935) [hereinafter Kierkegaard, Purity] (one of Kierkegaard's so called edifying addresses, arguing that pure intention requires superhuman effort and making an unconditional demand of decisive activity); Thomas Merton, No Man Is an Island 52 (1955) (alluding to the prevalence of this phenomena in the priesthood); Peggy C. Davis, Law as Microaggression, 98 Yale L.J. 1559 (1989) (decrying self-righteous behavior in the legal environment); see also Freedman, supra note 71, at 479-82 (using To Kill a Mockingbird as a vehicle for critiquing the unintentionally solipsistic and paternalistic character of many White civil rights lawyers).

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Of course, to avoid the problem of false empathy raised by Delgado is no easy task. The move toward real empathy may require more than just listening. It may also require a willingness to identify constraints, including power and hierarchy. While Delgado warns of false empathy, he pushes us toward the problematic space of the infinite other.

Wittgenstein suggests a less direct critique of empathy. He suggests that in the act of empathizing, we may attribute to the objects of our empathy emotional reactions that they do not really experience. Asking whether "such a thing as "expert judgment' about the genuineness of expressions of feeling" actually exists, Wittgenstein answers that "correcter prognoses will generally issue from the judgments of those with better knowledge of mankind." n78 The sort of knowledge that informs those "better judgments" will be a product of experience. n79 Knowledge gleaned [*116] through a wide range of experience and human interaction is thus a necessary precondition to empathy because knowledge

informs judgments.

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n78. Ludwig Wittgenstein, Philosophical Investigations 227e (G.E.M. Anscombe trans., 3d ed. 1968).

n79. Id. Experience can be guided, but what one learns is not a technique but correct judgments. There are rules, Wittgenstein observes, but they do not form a system, and only experienced people can correctly apply them. See id.

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The "better knowledge" that Wittgenstein has in mind implies a particular attitude toward experience, an attitude that embraces the porousness inherent in our interactions with the world. Acceptance of our particular orientation as provisional encourages us to exist outside of carefully constructed safe harbors where experimentation does not entail risk. n80 This suggestion to let our guard down, and to adopt vulnerability and openness as an orientation toward experimentation, is voiced by Roberto Unger. Unger asserts that because the "gesture of self-exposure lacks a predetermined outcome" n81 - a situation in stark contrast to the range of possibilities yielded by the shared claims of pre-existing communities - it emphasizes the power inherent in the individual to treat character as open and revisable. n82

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n80. See Roberto Mangabeira Unger, Passion: An Essay on Personality 95-99 (1984) [hereinafter, Unger, Passion] (acknowledging the risk of failure attendant in the exposure of our habits and modes of self-expression to reinvention). This type of risk, understood as a positive openness to "endured vulnerability," should be distinguished from the type of "risk" involved in violent opposition to the forces that threaten our physical selves. See also Simone de Beauvoir, The Second Sex 72 (H.M. Parshley trans. & ed., 1968) (1949) (suggesting that this type of "risk" is more consonant with Western notions of genuine autonomy than the more relational risks involved in embracing vulnerability).

n81. Unger, Passion, supra note 80, at 98.

n82. See id. Unger's vision of human psychology owes much to what he describes as "two different and even antagonistic traditions," that of the Christian-romantic view of human nature and the revolutionary modernism of the early twentieth century. Id. at 22-23. The former tradition also embraces vulnerability, though not always in the secular guise presented by Unger. See Soren Kierkegaard, Fear and Trembling passim (Alastair Hannay trans., 1985) (locating in the theistic "leap of faith" the only possible resolution to the anguished choice between rival goods). Less pietistic, though no less existential, is the romantic aspect of human nature embedded in the embrace of vulnerability. This vision complements the Christian tradition by prescribing "personal confrontations that escape the limits of any instrumental calculus" as the necessary precursor to self-knowledge and self-transformation. Unger, Passion, supra note 80, at 29. These sources of existential ideals find their common denominator in Kierkegaard, who viewed his superhuman confrontations with faith as capable of removing the obstacles standing in the way of achieving

temporal love. See William Barrett, Irrational Man 151-55 (1958). Thus the Christian-romantic view of human nature reconciles the "primacy of personal encounter and of love as its redemptive moment, and the commitment to a social iconoclasm expressive of man's ineradicable homelessness in the world." Unger, Passion, supra note 80, at 24.

The modernist aspect of Unger's philosophy lies in that movement's recognition that "the personality makes and discovers itself through its experience of not fitting into the given settings of its existence." Id. at 34. This axiomatic modernist insight is beautifully explicated in Lionel Trilling's distinction between sincerity and authenticity:

Sincerity, a congruence between avowal and feeling, can be achieved when there is no problem of form: it is based on the Romantic ideal of truth to the self and it presupposes a definite identity which it becomes the task of a lifetime to be true to. Authenticity is a more excruciating modern demand, which begins with the admission that there is a problem of form, and that this makes the congruence between avowal and feeling difficult: it recognizes that the issue is not truth to the self but the finding of the many selves that one might wish to be true to. It makes the liberating concession that a person, or a nation, has a plurality of identities, constantly remaking themselves as a result of perpetual renewals.

Declan Kiberd, Introduction, in James Joyce, Ulysses ix, ixxvii (Penguin 1992) (quoting Lionel Trilling).

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[*117]

Professor Unger believes that an essential attribute of experiential revision is "a subjection of the self to situations and encounters that shake the routines of ... outward life and the routinized expressions of ... passions." n83 Our personal capacity to explore the psyche has its methodological and pedagogical analogue in a scholastic willingness to experiment with structures of discourse. n84 Although our self-knowledge remains necessarily ephemeral, it serves as justification for action and revision, only so far as experience recommends. To some extent our willingness to experiment will depend on the degree to which we believe that problems such as racism and sexism cannot be eradicated without a fundamental alteration of our norms, our psychology and even our identity.

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n83. Unger, Passion, supra note 80, at 98.

n84. The limits, and even the efficacy, of this experimentation have been the subject of much debate in the legal academy. See, e.g., Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich L. Rev. 2411 (1989); Daniel Farber & Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 Stan. L. Rev. 807 (1993).

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One commentator believes that the solutions proffered by liberalism for our most disruptive social problems are mere tinkering on the surface, and that

racism is coterminous with the ideals of the Enlightenment project. n85 The truth in this position is a necessary adjunct to the imposition of a convenient legal formalism with respect to issues of race. But it is difficult to know how liberalism and racism will be linked in the future even if they were coterminous at their inception. Professor Unger suggests a way out of this negative dilemma in his admonition that precisely because our instincts and analyses may deceive us, we never know if a particular maneuver will be major or minor. n86 This inherent ambiguity should not cause despair, n87 but rather insist on deeply experiential methodology reliant for its normative prowess on the persuasive [*118] capacities of perspectives arising from endured vulnerability and radical openness.

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n85. See, e.g., David Theo Goldberg, Racist Culture (1993) (analyzing race, its social expressions and implications and the understanding of these in contemporary social analysis).

n86. See Unger, Passion, supra note 80, at 98.

n87. See powell, Racial Realism, supra note 63, at 550.

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This pragmatic epistemology suggests that a revisioning of empathy as a core democratic value requires that the concept be re-described in a way that embraces the openness that bathos or false empathy so notably lack. We are not hopelessly constrained by our perspectives - rather through engagement and vulnerability we can be influenced in a way that incrementally transforms our character. n88 Engagement does not entail becoming the other but rather requires possible openness to meaningful, contextualized encounters. This is not an idealist stance that ignores structural or institutional arrangements but asserts that structure once visible can be rearranged to allow for empathy and democracy.

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n88. Cf. Jody Armour, 83 Calif. L. Rev. 733 (1995). Professor Armour, drawing on recent research in cognitive psychology, distinguishes between stereotypes and personal beliefs. She argues that there is no necessary congruence between these mental attributes, but rather that stereotypes are a form of habit that may be overcome through conscious awareness. See id. at 734. It should be noted, however, that if stereotypes exist at a largely unconscious level, an enormous amount of vigilance and self-awareness will be necessary for their extirpation. See id. at 746-47 (citing Charles Lawrence, The Ego, the Id, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 322-23 (1987)).

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C.

Multiplicity as Participatory Empathy

A common response to the assertion that knowledge is provisional and thus

undeserving of an uncritical dominance is to invoke the negative aspects of post-modernism. n89 In one form, the post-modern world view perceives fundamental cultural fragmentation and collapse, a pathological splintering in all spheres of life. More particularly, certain post-modern theorists have characterized modern culture as ironically degraded or bemusedly crisic, or as kitsch laden. n90 Presented in this manner, post-modernism [*119] seems only to tear down or denigrate the achievements of liberal modernity without offering an alternative.

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n89. As a general matter, post-modernism may be understood as an attitude rather than a full-blown philosophy, and within the confines of theoretical discourse has been employed to signify divergent phenomena such as late-capitalist cultural logic, see Fredric Jameson, Postmodernism, or the Cultural Logic of Late Capitalism 1-6 (1991), and a "struggle over the technology of the human body." See Michel Foucault, The History of Sexuality, Volume 1: An Introduction (1978). Post-modernism also signifies a complete collapse of the relation between theory and its object. See Jean-Francois Lyotard, The Postmodern Condition: A Report on Knowledge (1984).

n90. See Jameson, supra note 89, at 55-57. In attempting to tie post-modern sensibilities to a Marxist teleology, Jameson refuses to either celebrate or disavow the entire jumbled concept. Though avowedly tendentious, his text provides a simultaneously comprehensive and accessible introduction to the post-modern and its antecedents in various current spheres. Other useful texts include David Harvey, The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change (1989) (providing a denser, more rigorously economic approach to the subject) and Universal Abandon? The Politics of Postmodernism (Andrew Ross ed., 1988) [hereinafter Universal Abandon] (providing representative takes on the subject from an array of disciplines).

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One alternative to the negative definitions so prevalent in post-modern discourse can be found in the psychological and theological concept of multiplicity. Multiplicity, most notably represented in the work of the neo-Jungian psychologist James Hillman, holds that the "crisis" of cultural fragmentation results from our psychological insistence on unity and singularity. n91 Borrowing from Greek mythology and Jungian traditions, Hillman counsels against a psychology of exclusion. In his view, psychological "polytheism" implies an essential and profound division of the soul. n92 Rather than viewing this fragmentation as a pathology, however, Hillman suggests that society would benefit from an alternative definition of the psyche. Hillman prescribes a restructuring of our view of the psyche as naturally multiple - in other words, altering our definitions instead of expanding our notion of disorder. It is no accident of history, he suggests, that the term "schizophrenia" and the number of cases of pathological multiple personalities appear at around the same time as the First World War, a time when the definition of the ego as a unifying force stood in stark contrast to the existential dissociations of early cultural modernism. n93 Hillman also refers to William James, who recognized psychological and cultural fragmentation nearly a century ago, noting that "reality MAY exist in distributive form, in the shape not of an all but of a set of eaches, just as it seems to be." n94

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n91. See James Hillman, A Blue Fire: Selected Writings 36-49 (Thomas Moore ed., 1989) [hereinafter Hillman, Blue Fire]; James Hillman, Re-Visioning Psychology 26-27 (1975) [hereinafter Hillman, Re-Visioning]. As I have argued elsewhere, the assertion that the modern, Western, unitary, and autonomous conception of the self is wrong and does not entail a necessary abandonment of structure. See powell, Multiple Self, supra note 26, at 1485.

n92. See Hillman, Re-Visioning, supra note 91, at 26 ("Polytheistic psychology refers to the inherent dissociability of the psyche and the location of consciousness in multiple figures and centers."); cf. Joseph Campbell, Myths to Live By 10-11 (1972) (noting that the identity constitutive aspect of shared symbols and myths creates ethical and social order).

n93. See Hillman, Re-Visioning, supra note 91, at 25; see also Jameson, supra note 90, at 305-13 (discussing political and cultural undercurrents of early modernism).

n94. Hillman, Blue Fire, supra note 91, at 43. James further notes that absolute notions of reality have only appeared to a few mystics, and to them only ambiguously. See id.

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[*120]

The multiplicity of the self has long been applied to problems of identity outside of the American, Western tradition. n95 The concept of "selflessness" in Buddhist philosophy denies "a self described in terms of its structure rather than its story." n96 This structural self, initially perceived as "permanent, unitary, and under its own power," diminishes in importance once the Buddhist practitioner begins to understand emptiness. n97 This process requires a thorough familiarity with the "ordinary experience of self," n98 which, once achieved, permits the insight of "emptiness" - the recognition of persons and things as "dependent arisings," existing interdependently rather than independently. n99 In this philosophy, the self that people tend to see as concrete exists only as an illusion, but an illusion with ethical consequences. Though consideration of such views moves us seemingly far afield from prevailing legal discourse, the tenets of Buddhist philosophies and neo-Jungian psychology suggest that perhaps the conceptions of self-identity embedded in legal structures leave us predisposed to attach ourselves to the illusory narrative of the unitary self. Both show us how the constructed and unessential phenomena of language and concepts create the patterns that we perceive as static, natural and neutral. n100

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n95. See generally powell, Multiple Self, supra note 26, at 1484 n.9 (citing recent scholarship on post-modern and post-liberal conceptions of the self).

n96. Anne Carolyn Klein, Meeting the Bliss Queen: Buddhists, Feminists, and the Art of the Self 124 (1995); see also powell, Multiple Self, supra note 26, at 1505-09 (discussing Buddhist conceptions of the self and noting that Buddhism does not attempt to construct a unitary, coherent sense of self).

n97. Klein, supra note 96, at 124.

n98. Id. at 125.

n99. Id. at 127.

n100. Of course, both Buddhist philosophy and Jungian psychology suppose that there is an "essential" consciousness that goes beyond concepts and language. See Jeremy W. Hayward, Shifting Worlds, Changing Minds: Where the Sciences and Buddhism Meet 132 (1987); The Portable Jung 23 (Joseph Campbell ed. & R.F.C. Hull trans., Viking Press 1971) [hereinafter Portable Jung] (providing a succinct overview of Jung's understanding of the psyche and the self).

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One of the central insights of psychological multiplicity is the notion that many liberal paradigms rest on faulty psychological premises. As illustrated below, multiplicity explains some of the ways in which the psychological phenomenon of "projection" n101 serves to mask power disparities that undermine the traditional First Amendment narrative's remedy of "more speech." The central point to be derived from the following discussion is that psy- [*121] chological phenomena camouflage acts in which the dominant culture vilifies and silences minorities, thereby blocking meaningful access to democratic institutions. The argument that the marketplace of ideas perpetuates disparities in power does not, as Cass Sunstein notes, suggest that free speech is a myth. n102 Rather, it means that "what seems to be government regulation of speech might, in some circumstances, promote free speech .... [and] that what seems to be free speech in markets might, on reflection, amount to an abridgment of free speech." n103 The discourse within the marketplace of ideas may, in some instances, permit a position that is not only unpopular, but hateful, to limit the participation interest of other individuals. After exploring the more abstract insights of multiplicity, I will examine its utility in First Amendment jurisprudence.

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n101. Projection refers to a psychological mechanism whereby we project onto others aspects of our own unconscious qualities and mistake these imaginings for reality. See June Singer, Boundaries of the Soul 361-62 (1994).

n102. See Cass R. Sunstein, A New Deal for Speech, 17 Hastings Comm. & Ent. L.J. 137, 139 (1994).

n103. Id.

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In one of several law review articles that explore the implications of psychological multiplicity for the law, Gerald Torres writes that the term multiplicity "implies a decentralized ideology and economy and, ultimately, a non-hierarchical culture." n104 Similarly, Robert Chang notes that "each social agent is inscribed in a multiplicity of social relations," including sex, race, nationality, and vicinity. n105 Each agent represents multiple subject positions, positions which are themselves "the locus of multiple possible constructions, according to the different discourses that can construct

[those] positions." n106 Angela Harris argues that a jurisprudence based on "multiple consciousness" can overcome what she views as the dangers of essentialism in feminist legal theory; namely, that "the attempt to extract an essential female self and voice from the diversity of women's experience" merely reinforces socially constructed norms and minimizes the educative value of experiences that fall outside that framework. n107 While none of the [*122] above definitions precisely coincides with psychological multiplicity, particularly with reference to the antecedent and essential aspects presupposed by the latter, the view of multiplicity as a strategic method is common to both legal and psychological scholarship. As the positions taken by the above commentators indicate, the notion of multiplicity has profound implications for the static identity categories that have long been presumed in legal thinking, and have too often resulted in cursory dismissal of claims falling outside recognized narrative structures.

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n104. Torres, supra note 26, at 1005.

n105. Robert S. Chang, Essays: The End of Innocence or Politics After the Fall of the Essential Subject, 45 Am. U. L. Rev. 687, 690-91 (1996).

n106. Id. (citing Chantal Mouffe, Hegemony and New Political Subjects: Toward a New Concept of Democracy, in Marxism and the Interpretation of Culture 89-90 (Cary Nelson & Lawrence Grossberg eds., 1988)). Professor Chang presumes that essentialism is always a proxy for coalition, or identity, politics and thus always a pseudonym for continued marginalization.

n107. Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 613-15 (1990) [hereinafter Harris, Race and Essentialism]; see also Angela P. Harris, Foreward: The Unbearable Lightness of Identity, 11 Berkeley Women's L.J. 207 (1996); Cynthia Ozick, Innovation and Redemption: What Literature Means, in Art and Ardor 238 (1983); Mari Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 Women's Rts. L. Rep. 7 (1989).

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We might also take this view of multiplicity as strategy a step further by asking what a multiple conception of the self conveys analytically about race relations and resistance to proscriptions of hate speech. Jung understood the Self to contain many autonomous but intimately related components that tend toward wholeness or unity. n108 One of these components, which he calls the "shadow," represents "unknown or little known attributes and qualities of the ego" that people prefer to deny the existence of in themselves. n109 Through denial of their existence, these little known ego attributes are frequently projected onto political others, although the same attributes reside in ourselves, because we prefer to convince ourselves that the "other" is wrong. n110 Without thinking, we accept that if the "other" would only behave in a certain manner, everything would be better. These attributes are characterized as subconscious because they are integral components of our personality that emanate from our personal past but have been repressed, thus obtaining an inferior and primitive quality. n111 This absence of consciousness gives rise to a moral resentment, because the psyche tends toward equilibrium and psychic deficiencies demand to be addressed. n112 Our capacity for mo- [*123]

rality compels us, despite the pain of unmasking these less than salutary aspects of personality, to assimilate this unconscious part of the conscious self. n113 Though such analysis is unpleasant, it tells us something important not only about each of our characters as they presently are, but about what they want to be.

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n108. See generally The Portable Jung, supra note 100, at 23 (providing a succinct overview of Jung's understanding of the psyche and the self).

n109. See M.-L. vonFranz, The Process of Individuation, in Man and His Symbols 158 (Carl Gustav Jung et al. eds., 1964).

n110. See Carl Gustav Jung, Approaching the Unconscious, in Man and His Symbols, supra note 109, at 85; see also Lawrence, supra note 88, at 322 (noting that the human mind defends itself against the discomforts of guilt by excluding unattractive beliefs and ideas from consciousness); powell, Multiple Self, supra note 26, at 1502-05 (1997) (discussing how the unconscious projects "racial" traits onto the "other").

n111. See The Portable Jung, supra note 100, at 80-81 (postulating that incompatible psychological elements are subject to repression, becoming an unconscious part of our conscious personality, rather than an aspect of the unconscious, itself a separate sphere of the psyche).

n112. See id. at 81. Experience is not only how we relate to the world, creating categories to deal with perceptions, but also a set of internal structures and experiences that we project into the world, and onto objects or persons. This isn't to negate outer reality, which is very real, but only to recognize that our reality has an equally real "inner" component. According to Jungian psychology, reality is "objective" insofar as we all experience similar archetypes in ways that allow us to empathize with each other's inner experience and perceptions of the world. This presupposes, however, a fairly high level of awareness and serious engagement in dialogue with the meaning of internally produced images. See Hillman, Blue Fire, supra note 91, at 26 (providing axiomatic criteria for interpreting images, and suggesting that all images, if subjected to these criteria, obtain the status of archetype).

n113. See Singer, supra note 101, at 165 (quoting Jung for the proposition that uncovering the shadow side of personality is an essential act of self-knowledge and meets with considerable resistance from the ego).

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A Jungian interpretation of the Biblical story of Job offers an instructive example of how awareness of the shadow aspect of the personality can lead to a profound psychological transformation. n114 The opening of the story finds Job as a seemingly well-adjusted, successful and happy individual blissfully unaware of a plot between God and Satan to test Job's renowned faith in his God. n115 In order to test this faith, God permits Satan to subject Job to a variety of calamities, until Job has lost virtually everything to which he has accorded any value. n116

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n114. See Edward F. Edinger, Ego and Archetype 76-96 (1972); see also Answer to Job, in The Portable Jung, supra note 100, at 519-650 (providing a different, but also psychologically useful, reinterpretation of the Job story).

n115. See Job 1:1-5 (Revised Standard Edition).

n116. See id. at chs. 1-2.

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Job's initial response is one of despair and alienation, yet influenced by his friends, he remains convinced of his innocence and righteousness. n117 According to this interpretation, Job's outlook reflects his "one-sided conscious attitude of purity and goodness." n118 At this point in the story, Job is only vaguely aware that his experience has something to do with his past and with a larger reality that he refuses to comprehend. n119 As Edinger notes, Job does not say what the iniquities of his youth were, but Job makes it clear that he no longer considers himself responsible for them: "those past sins [represent] repressed contents which he does not [*124] want to make conscious since they would contradict his self-righteous image of himself." n120

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n117. See id. at chs. 3-4. Job's friend Eliphaz attempts to console him, stating: "Is not your fear of God your confidence, and the integrity of your ways your hope? Think now, who that was innocent ever perished? Or where were the upright cut off?" Job 4:6-7.

n118. Edinger, supra note 114, at 85.

n119. See Job, supra note 115, at ch. 6.

n120. Edinger, supra note 114, at 86. For examples of Job's self-righteous attitude, see Job, supra note 115, at chs..29-30 (nostalgizing his privileged place in the community and concluding: "But now they make sport of me, men who are younger than I, whose fathers I would have disdained to set with the dogs of my flock.").

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Job's friends try to give him advice. n121 His friends contend that he should continue down his former path, sure of his righteousness - in other words, they counsel Job to maintain the status quo in ignorance that all has collapsed around him. n122 Job's ultimate response is to avoid both extremes; instead, he refuses to accept his fate without ascertaining the meaning of these events. n123 By confronting God, Job is made aware of the meaning underlying his ordeal: a transformation of his own psychic orientation to the world. n124 Through his confrontation with the powerful numinosity of God, Job is forced to recognize that his former attitude was one of blind arrogance. n125 During the encounter, God reveals Himself to Job as an awesome totality, combining all dimensions of good and evil. n126 From this, Job gains an awareness of his own shadow side, which he had been repressing for so long. n127 That is, "God reveals his own shadow side and since man participates in God as the ground of

his being, he must likewise share his darkness." n128 Whereas Job previously projected what he perceived as weak and unenviable attributes onto others, he now recognizes that they are an inevitable dimension of his own personality. n129

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n121. See Job, supra note 115, at chs. 32-37.

n122. See id. at ch. 34.

n123. See Edinger, supra note 114, at 85.

n124. See id. at 91. The language in this chapter is a powerful explication of the difference between God and humans. See Job, supra note 115, at 38:1-33.

n125. See Edinger, supra note 114, at 91.

n126. See id. at 89-91

n127. See id. at 91.

n128. Id.

n129. See id.

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This experience of the shadow operates at the level of racial politics as in all interpersonal relationships. Angela Harris parallels Hillman in observing that for groups denominated as racially "other" the "experience of multiplicity is also a sense of self-contradiction, of containing the oppressor within one self." n130 In much the same way, the White oppressor also contains the other within him or herself. The contrast between Hillman and Harris occurs only to the extent that Hillman locates the shadow of ra- [*125] cism as being "essentially present in "white' consciousness itself and not, as usually claimed, only projected outward into "black.'" n131 A concrete example of the external and internal function of the "other" as a disembodied yet integral part of the self occurs in the process of exclusions by race and socioeconomic status. As Zora Neale Hurston's character Janie, from Their Eyes Were Watching God, painfully recalls, being placed in a social context of "Whiteness" changed her experience of self:

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n130. Harris, Race and Essentialism, supra note 107, at 608.

n131. Hillman, Blue Fire, supra note 91, at 8.

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So when we looked at de picture and everybody got pointed out there wasn't nobody left except a real dark little girl with long hair standing by Eleanor.

Dat's where Ah wuz s'posed to be, but Ah couldn't recognize dat dark chile as me. So Ah ast, "where is me? Ah don't see me.' n132

In order to understand the ontology of the fractured self, it is important to question the construction of categories. Law as a rule does not have the dubious luxury, promoted in Hillman's image of psychology, of allowing psychological polytheism to erupt without attempting to achieve insight. n133 The law's view of the self has nudged forward, but it is still largely based in an eighteenth century notion of the self that cannot withstand critical review from psychological, anthropological, or popular perspectives. Yet the multiple self is shadowed in the work of Freud and Jung and is in full bloom in Hillman's. Law loves stable categories, even if they are in conflict with reality, and to reconcile this need with an essentially multiple conception of the self requires that we undertake an examination of how categories are articulated and become culturally intelligible and legally manageable. The burgeoning literature on the social construction of race and the renaissance of interest in the work of authors such as James Baldwin and Zora Neale Hurston assist in this endeavor. n134

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n132. Zora Neale Hurston, Their Eyes Were Watching God 21 (1937).

n133. See Hillman, Blue Fire, supra note 91, at 9 ("There is no need, in a polytheistic psychology, to integrate, to "get it all together,' or to find some ultimate blending of the many impulses and directions that erupt from the soul. A variety of gods and goddesses are to be honored, the tensions among them sustained and enjoyed.").

n134. See generally Goldberg, supra note 85 (demonstrating that social subjects have been conceptualized foremost in racial terms since the institution of modernity and that these racisms change over time to reflect prevailing social conceptions); Ian F. Haney Lopez, White by Law: The Legal Construction of Race (1996) (exploring the social and legal origins of White racial identity); Michael Omi & Howard Winant, Racial Formation in the United States from the 1960s to the 1990s (1995) (exploring the creation and change of racial concepts and how they become the focus of political conflict); Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 Harv. L. Rev. 1843 (1994) (asserting that equivocation, which stems from a dichotomous conception of political space as either administrative conveniences or autonomous entities, underlies the American law of local governments); Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1709 (1993) (arguing that American law protects entrenched White power); Martha R. Mahoney, Segregation, Whiteness and Transformation, 143 U. Pa. L. Rev. 1659 (1995) (exploring the connections between residential segregation and White privilege).

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[*126]

Both the Buddhist concept of the self, or no permanent self, and Hillman's concept of the multiple self are in sharp contrast to the nineteenth century notion of an independent, unitary, autonomous self. Instead both of these selves share substantial similarities with concepts of the self suggested by many late modernists and feminists. The latter groups tend to view the self as interdependent, interconnected, and constantly being reconstituted through

social interaction.

If any of these views of the self are taken seriously as contrasts to the pre-given, unconstituted, liberal self, then systematic exclusion through hate speech not only threatens participation, but threatens both the construction and maintenance of the whole notion of an autonomous self. n135 Furthermore, the diminished selves that result from exclusion cannot be healed through more speech. The self that requires the exclusion of other potential selves through hate speech and other practices is not simply an independent self, but a self that requires the subordination of others, a direct conflict with our democratic norms.

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n135. See powell, Multiple Self, supra note 26, at 1509-11. It should be noted that this way of viewing autonomy does not rest on the notion that the self is pre-given to social constitution and structures. Rather these alternative conceptions suggest an autonomous self that is at least in part defined by, and acting within, a larger social context and discourse.

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What this suggests is that restrictions on speech should be challenged to the extent that they undermine the self, as well as to the extent that they undermine our participation in democratic processes. This is no less true of other values, however, such as equality. n136 Racist speech, however, is often practiced for the purpose of distorting participation and is part of a racial discourse that not only maintains racial hierarchy and exclusion, but also helps to create and maintain the racial subject. In fact, the very categories of Whiteness and racial Other are part of racial exclusion and racial discourse. n137 The political legacy that flows from racist speech is constitutive of both the racial self and White supremacy. If one is then seriously concerned about self expression, participation and autonomy, then one must be willing to examine how and where speech disrupts these values. There must be a self, [*127] for self-expression to have meaning. One can easily imagine circumstances where speech or equality diminishes the self and participation, just as in some circumstances speech or equality will support these values. When speech undermines the self, however, it is difficult to articulate how it can be justified by democratic norms.

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n136. See generally powell, Worlds Apart, supra note 6.

n137. See generally sources supra note 134, with special attention given to Goldberg, Omi &Winant and Haney-Lopez.

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It seems clear that the existing categories of free speech jurisprudence do not comport with the reality of the socially constructed racial self as illuminated by an empathetic understanding of our multiple identities. Arguments concerning the persistence of racism in insidious and subtle forms are rendered mutely inarticulate by the correct categories. Our propensity to project undesirable characteristics onto a political other serves to perpetuate and

reify deeply embedded structural disparities in the marketplace of ideas. As Professor Sunstein points out, while constitutional jurisprudence has long since abandoned the Lochner-era view of the Constitution as a prohibition of governmental interference with the distribution of rights, this laissez-faire attitude persists in the area of free expression. n138 Within the First Amendment framework, pre-New Deal notions of neutrality still predominate. n139 On one hand, the First Amendment's defiance of New Deal insights into the nature of unregulated marketplaces serves the important value of checking myopic governmental restrictions on individual liberties. n140 On the other hand, however, the persistence of laissez-faire attitudes toward the marketplace of ideas is a function of our inability to recognize the prevalence of unconscious racist attitudes and practices. Because these attitudes persist beneath the surface of American life, the occasional eruption of hateful forms of expression is treated as anomalous. This position, while psychologically soothing, fails to recognize the severe harm to the minority cultures' participatory interests that occurs when an overtly threatening act of racial hatred supplements the structural de facto racism by the majority culture of our society.

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n138. See Sunstein, supra note 102, at 138.

n139. See id. at 139.

n140. See, e.g., Texas v. Johnson, 491 U.S. 397 (1989) (finding unconstitutional a statute proscribing flag burning).

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As Professor Delgado notes, the experience of racism in contemporary America is analogous to the way a seeing eye dog identifies a clumsy footfall on the part of its master - much prejudicial behavior is unconscious and only registers to someone attuned to it through an aggregation of experience. Moreover, subtle and un- [*128] conscious forms of racist behavior, because of their ephemeral nature, are often purposefully overlooked. No one wants to accuse another of being racist if it is at once clear that the person's behavior is unconscious. This leads to another aspect of the frustration voiced through narrative: the inability of legal doctrine to identify structurally important but diffuse and subtle racism.

In a recent work, Professor Delgado, a prominent Critical Race Theorist, provides a fascinating compendium of "images of the outsider in American law and culture." n141 His historical survey shows that racial depiction throughout American history has been predominantly negative and that the dominant stereotype changes to reflect society's needs. n142 The historical depiction of Asians in film, literature, cartoons, and popular humor provides an instructive example: scapegoats during depressions, cunning and savage when war threatened, and treacherous or not-quite human when the exigencies of military action demanded. n143 While these images strike contemporary observers as clearly wrong, current stereotypes are passed off as unexceptionable, trivial or a valid generalization based on the common attributes of a particular group. n144 The reason for this, according to Delgado, is that racist views are always embedded in the dominant interpretive structure. n145

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n141. Delgado & Stefancic, supra note 14, at 41-45.

n142. See id.

n143. See id.

n144. See id.

n145. See id.

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While this structure both valuates and makes the racial other, it also normalizes White supremacy, which can be seen in a discourse of neutrality and colorblindness.

1. Objections to Multiplicity as Empathy: Relativism

I have offered an alternative to the liberal concept of the self that has implications for how we view equality and free speech. As an initial matter, one can imagine a number of objections in response to a conception of the psyche, and by extension, identity, as multiple. Two which seem particularly potent are the charges of relativism and essentialism. Hillman himself anticipates the issue of perceived relativism when he alludes to an apparent "paradise of seductions and escapades," but notes that from within any particular narrative structure those of another appear as unrestricted vagaries. n146 This observation comports with the epistemic structure upon which Professor Fish predicates his deconstructionist [*129] philosophy. n147 According to Fish, the proposition of a socially constituted subject simply means that all knowledge is interpretation and belief. Far from suggesting that knowledge can be acquired without limit, however, this view focuses on the cultural and institutional practices of interpretive communities. The existence of interpretive communities suggests that although each narrative is unique, we are all subject to social and cultural constraints which can organize our experience and our selves. n148 The very ability to formulate a decision in terms that are recognizable to a particular community "depends on one's having internalized the norms, categorical distinctions, and evidentiary criteria that make up one's understanding" of that community. n149

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n146. Hillman, Blue Fire, supra note 91, at 56.

n147. See generally Stanley Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (1989) [hereinafter Fish, Doing What Comes Naturally] (discussing interpretation resulting from paradigm-specific criteria). For a succinct and accessible overview of Fish's philosophy as it relates to legal scholarship, see Peter C. Schanck, Understanding Postmodern Thought and Its Implications for Statutory Interpretation, 65 S. Cal. L. Rev. 2505, 2541-72 (1992).

n148. See Fish, Doing What Comes Naturally, supra note 147, at 141-42.

n149. Schanck, supra note 147, at 2546.

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This view remains susceptible to the charge of relativism because it rejects the possibility of any neutral perspective, thereby exposing the contingent bases for all judgments. The impossibility of neutrality becomes a problem, for instance, when the idiom utilized by one party necessarily marginalizes the idiom dominant in another narrative structure; n150 however, Fish points out that once we become cognizant of the fact that neutral perspectives are unattainable, we can realize the implications of radical constructivity. n151 That is, our individual perspectives are imbued with the preferences, assumptions, and conventions of particular communities, with the result that the internal constraints and standards of those communities circumscribe any judgments we make. n152

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n150. See Torres, supra note 26, at 1002-03.

n151. See Stanley Fish, Is There a Text in this Class?: The Authority of Interpretive Communities 319 (1980).

n152. See id.

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This description of particular communities as establishing norms explains why transformation in juridical culture is incremental and at times intolerably slow. In fact, the notion that social reality is constructed leads some commentators to suggest that there are no longer any incentives for political activism. n153 If we cannot escape the conventions that by definition constrain us, how can we act in a critical and transformative capacity? Multiplicity's [*130] answer to the charge of relativism is that a de-constructed, experiential conception of identity formation succeeds precisely because it recognizes the circumscribed and structured nature of human agency. n154

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n153. See Schanck, supra note 147, at 2548 n.172.

n154. This position borrows somewhat from Fish's notion of "overlapping communities." See Fish, Doing What Comes Naturally, supra note 147, at 141. Against the charge of not being able to transcend one's own contingent identity, it is sufficient to note that Fish "is not suggesting a monolithic community with rigid and uniformly held conventions." Schank, supra note 147, at 2549 (responding to the charge that Fish is a conservative). Because each community is pluralistic, and because communities overlap, change is in fact inevitable. Change is constrained because of a lack of interaction. Transformation then becomes a matter of exploration and exposure whereby some possibilities are rejected and others enjoined.

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Mere cognizance, of course, is not sufficient. As Professor Torres notes, a version of multiplicity which satisfies itself with awareness will fail to alter patterns of dominance, if only because even a critical evaluation of privileges associated with membership in a particular group reinforces membership in that group. n155 Implicit in this limitation is that the central problem for marginalized people, the "need to reform conceptions of democratic representation in a way that supports the underlying legitimizing justifications of democracy without systematically repressing the capacity for minority self-determination," n156 is no less complex when viewed from within a post-modern paradigm. Reformulation of the problem requires a complex understanding of the numerous demands made upon those who are disproportionately the victims of harmful speech, among other inequalities, and an approach which recognizes group differences, complex equalities and multiple forms of justice.

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n155. See Torres, supra note 26, at 1005.

n156. Id. at 1006.

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2.

Objections to Multiplicity as Empathy: Essentialism

The answer to the charge of essentialism follows a similar course. In its simplest form, essentialism describes the belief that among diverse life experiences there exist commonalities which are reducible to claims concerning shared realities. It is possible, in this vein, to claim that multiplicity will only serve to mask the perpetuation of dominant cultural narratives and will reaffirm the privileged position of current standards. Robert Chang appears to make this argument when he vilifies coalition politics because the identification of articulable common interests remains dependent on political exigency; n157 however, his version of multiplicity is [*131] predicated on establishing, and maximizing the length of "the chain of equivalences set up between the defense of the rights of one group and those of other groups." n158 What Chang ignores, then, is the necessity of exploring our identities in order to locate these sites of intersection and commonality.

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n157. See Chang, supra note 105, at 690.

n158. Id.

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The total absence of categories would effectively debilitate this enterprise. Accepting the notion of multiplicity does not establish an alternative hegemonic structure so much as it establishes a strategic method of locating and developing commonalities. As Joan Chalmers Williams notes, "claims of sameness are not mere assertions of pre-existing similarity; they are a way

of carrying on discussions about social ethics." n159 In contrast to Chang, Patricia Williams has located the inefficacy of coalition or identity politics, not in political exigency, but in apathy. In her view, it is not the assertion of rights that has done the most harm to the struggle to end racial and sexual domination, but the lack of commitment to rights. n160

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n159. Joan C. Williams, Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory, 1991 Duke L.J. 296, 299.

n160. See Patricia Williams, The Obliging Shell: An Informal Essay on Formal Equal Opportunity, 87 Mich. L. Rev. 2128 (1989).

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The self-conscious use of identification as a political strategy is nonetheless subject to attack. Angela Harris's "nuance theory" of essentialism posits that even where sensitivity to differences, contexts and magnitudes of experience exist, these subtle nuances are merely footnotes to the general account, leaving an essential experience that is equivalent to the dominant narrative. n161 It would be difficult not to sympathize with this account of how dominant narratives replicate themselves. Harris goes on, however, to favorably describe Zora Neale Hurston's conception of identity as "a construction, not an essence - something made of fragments of experience, not discovered in one's body or unveiled after male domination is eliminated." n162 The recognition that reality is constructed, it seems, limits any recourse to essentialism.

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n161. See Harris, Race and Essentialism, supra note 107, at 595.

n162. See id. at 613.

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This description of identity as mere fragments of experience begs the question of how one is to struggle against oppression. On one level, the dissection of essentialism is certainly important, due to the insights it affords us into the constitutive power and indeterminate oppression of identity. Wholesale rejection of essentialism in every aspect of existence is counterproductive, however, to {*132} the extent that this strategy disregards our need for psychological regularity. Professor Harris, recognizing the intractability of the essential in legal theory, enumerates its useful components. Among these are intellectual convenience, emotional safety, provision of a relatively safe arena for engaging in power struggles and cognitive necessity. n163 Of course, an internal tension lies within this criticism. As Martha Minow points out, some unifying categories are necessary to organize experience; even at the cost of denying some of it, some essentialism remains strategically indispensable. n164

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n163. See id. at 605-07. This list was formulated with feminist theory in mind, but serves also to describe the effect of essentialism in arenas such as civil rights or union organizing.

n164. See Martha Minow, Feminist Reason: Getting It and Losing It, 38 J. Legal Educ. 47, 51 (1988). Minow notes that the existence of certain categories is a result of "psychodynamic development," and thus built into our psyches. Id. Similarly, Cornel West admonishes that even if one accepts the post-structuralist claim that nothing exists outside social practices, "without totality, our politics become emaciated, our politics become dispersed, our politics become nothing but existential rebellion. Some heuristic (rather than ontological) notion of totality is in fact necessary if we are to talk about mediations, interrelations, interdependencies, about totalizing forces in the world." Anders Stephanson, Interview with Cornel West, in Universal Abandon, supra note 90, at 269.

In many ways the issues of essentialism and relativism reflect what Bernstein refers to as Cartesian anxiety: there is either an objective essential reality or there is only radical, skeptical, relativist anti-essentialism. See Bernstein, supra note 54, at 18. This choice is left as the single possibility and is one of the common mistakes of late and post-modernity. See id. at 23. In fact, we may be essential through one lens and not through another. See id. And, of course, the lack of objective formalism does not entail relativism or complete subjectivity. See id.

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Rather than continue to debate essentialism as an either/or proposition, we should attempt to remain mindful of the power of simplifying categories to perpetuate unconscious, oppressive social pathologies, while simultaneously remaining vigilant with respect to the complexity and anomaly of experience. Such an approach does not yield a practical complacency, but rather would take advantage of the insight that "the eclecticism of theory mirrors the historical specificity of the project of building a post-modern politics," n165 a politics which both challenges distributions of power and accounts for the ways in which we view the world. Similarly, Professor Unger admonishes us to retain the aspect of modernist culture that "advocates a relentless recombination of the experiences traditionally identified with distinct roles, genders, classes, or nations," and "supports both a particularizing and universalizing discourse about our experience of life with other people. The [*133] point is not to choose one over the other but to change the way we understand and practice both." n166

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n165. Torres, supra note 26, at 1005.

n166. Unger, Passion, supra note 80, at 79-80.

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In recounting a story by Zora Neale Hurston, Professor Harris shows that "questions of difference and identity are always functions of a specific interlocutionary situation - and the answers, matters of strategy rather than truth." n167 The central insight of multiplicity in legal theory is that our

democratic tradition calls for a synthesizing, rather than a unifying, voice. Instead of displacing the great, liberal normative values of empathy/respect, autonomy/connectedness, participation/membership, human dignity/justice and liberty/equality, we should work to intertwine them in such a way that these values are hollow for no one. That tensions exist within and between these sets of values bespeaks our varied stories, and reminds us to envision a more encompassing notion of democracy. Despite the danger of importing modes of dominance, multiplicity recognizes that change always occurs on the foundation of previous narratives and transformation is available through meaningful experience.

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n167. Harris, Race and Essentialism, supra note 107, at 611.

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II.

The Pragmatic Case for Democracy

The futility of locating a neutral vantage point from which to compare and mediate between conflicting values has failed to dissuade critics and commentators from advocating for change. n168 Nor has the indeterminacy of language or the non-inclusiveness of dominant narratives relieved contestants from the need for considering the persuasive force of their arguments. n169 To the extent that we insist that theory resolve tension instead of a more modest goal of informing how we think and talk about these tensions, we are likely to find theory of very little use. This may be one reason that post-modernists have weighed so heavily against a grand narrative. But it would also be a mistake to believe that we can or [*134] should try to exist without a narrative. Indeed, the anti-narrative itself has been charged with being the latest grand narrative. n170

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n168. See MacIntyre, supra note 52, at 1-11.

n169. Nor should it. Stanley Fish argues that the success of any claim should depend on the skill of its proponent. See Schanck, supra note 147, at 2550. Schanck states that Fish goes so far as to suggest that the descriptive accuracy (which depends, of course, on the assumptions of the community) of an argument shouldn't matter as much as "how successfully the proponent utilizes the rhetorical conventions of the community." Id. at 2551. See also Fish, Doing What Comes Naturally, supra note 147. That his "solution" should idealize language in spite of himself shouldn't be surprising, given Fish's illustrious career as a Professor of Literature.

n170. See Harvey, supra note 90, at 8, 339.

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The failure to articulate a workable theory both creates confusion and reflects the confusion that results from attempts to fit a round narrative through a square framework. n171 Because we tend to reify even flawed theories

over time, we should revisit the assumptions that underlie cherished values. Through this process we may agree that some assumptions are no longer valid. The important point is that agreements and underlying assumptions should be viewed as provisional, and as effective only to the extent that they promote and extend the democratic ideal. n172

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n171. See supra note 14 (providing examples of theories of the First Amendment and subsequent criticisms).

n172. Of course, one might question whether the democratic ideal, as I, or any other commentator, define it, should be accepted as an admirable goal. Uncritically, no. However, a comprehensive answer to this question lies outside the scope of this Article. The notion of a democracy that is predicated on substantive notions of participation, on institutions which evince a commitment to membership and ownership for all participants, and that seeks to maximize liberty and equality through a shared sense of justice is presumed throughout this piece to be an admirable and attainable ideal.

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The critique of traditional First Amendment doctrine developed in the previous section presupposes an acceptance of a pluralist democracy as the appropriate institutional framework for application of the First Amendment. In a pluralist democracy, participatory access is a primary societal value within which exist intertwined strains of liberty and equality. Where democracy is viewed as paramount, constitutional jurisprudence balances the significant interplay between the values of liberty and equality. Without question, the history of the Constitution, and particularly the First Amendment, has privileged liberty interests over equality interests. The nascent democratic leanings of the American experience were identified by de Tocqueville, n173 at a time when liberation from tyranny was of principal concern. The idea began to germinate in the twentieth century, with the advent of universal suffrage and the inception of substantive equality. Today, the aspiration to full and meaningful access to participation remains unfulfilled, and for too many democracy is a dream continually deferred. n174 This is partially because we have little practical experience with equality relative to liberty. If genuine democracy, with its concern for participatory equality, remains as an ideal, we [*135] need to take seriously Dewey's pragmatic insight that our future is implicated in our present choices. n175 Instead of allowing for our continued descent into racial and class-based social anomie, we need to overcome the academic and practical hesitancy that creates inviolable structures through inertia. This section provides a pragmatic formal justification for democracy as a primary value by highlighting its experiential, experimental and participatory strains. In order to justify a mode of First Amendment analysis that relies on balancing, the multiple interpretive communities that constitute our society must accept democracy as a mediating principle.

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n173. Alexis de Tocqueville, Democracy in America (1835).

n174. See Langston Hughes, Harlem, in Crossing the Danger Water: Four Hundred Years of African-American Writing 508 (Deirdre Mullane ed., 1993)